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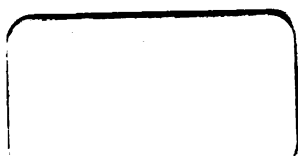
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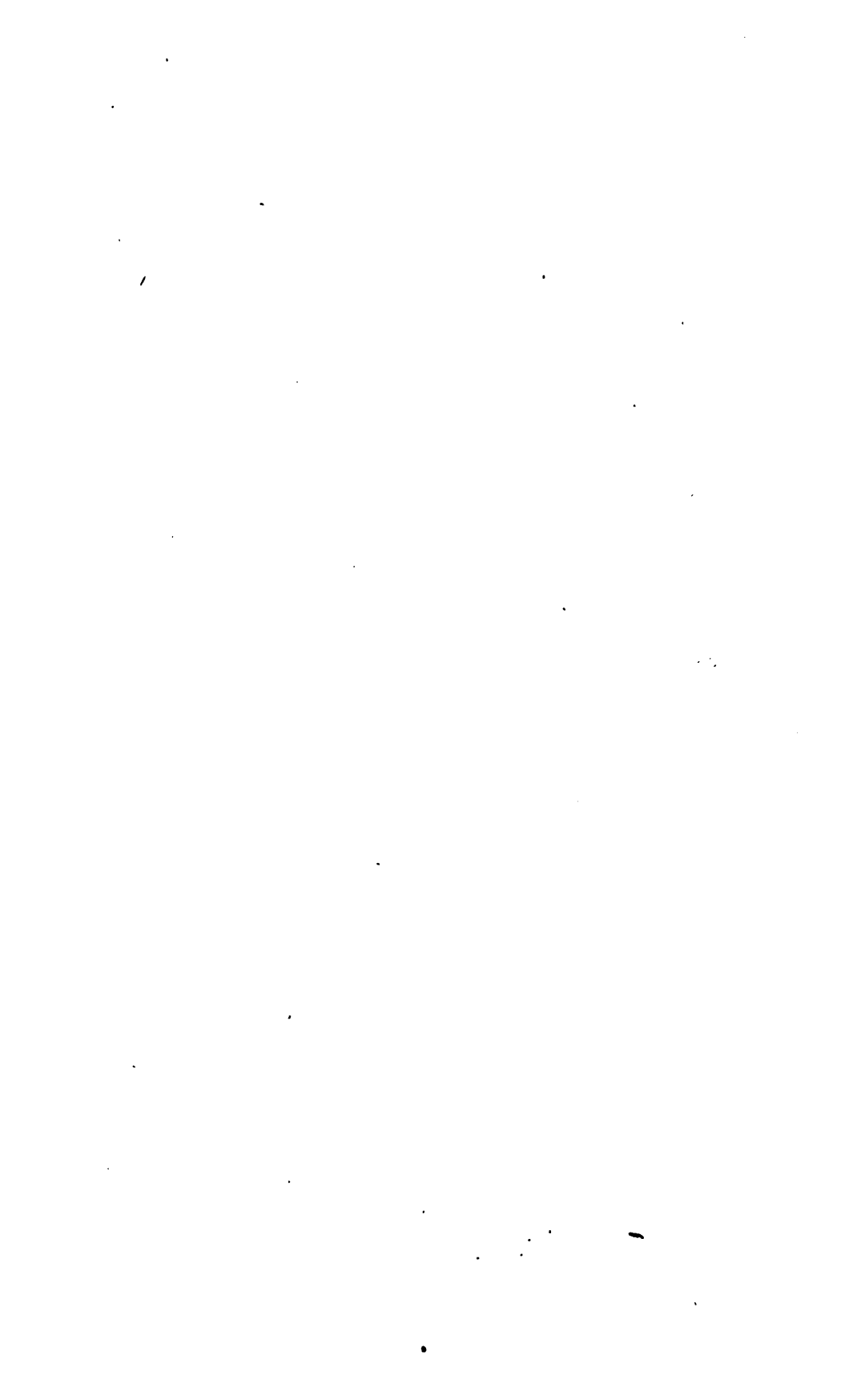
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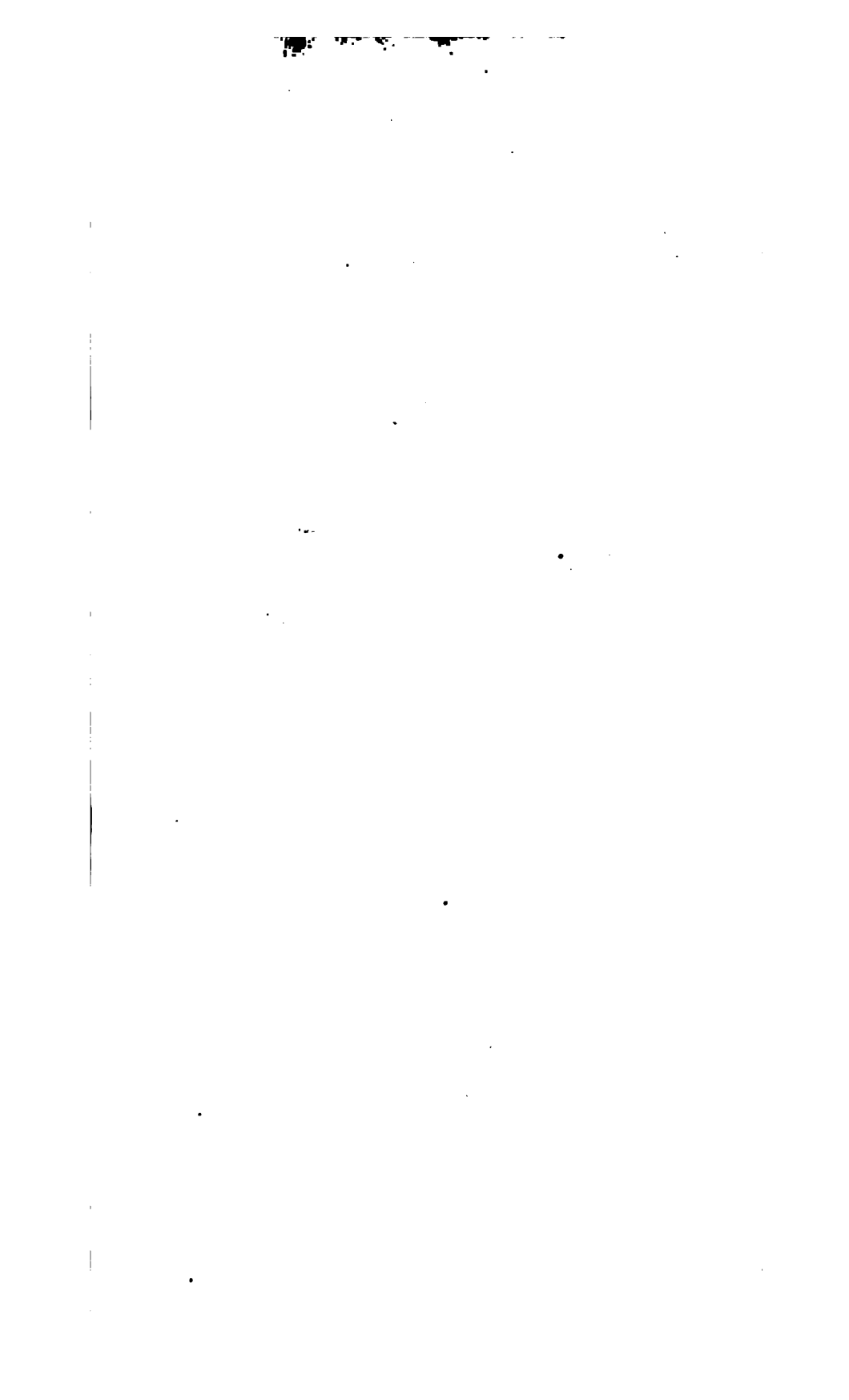
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1871

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THE
AMERICAN DECISIONS

CONTAINING THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.**

COMPILED AND ANNOTATED

By A. C. FREEMAN,

**COUNSELLOR AT LAW, AND AUTHOR OF "TREATISES ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.**

VOL. LXXXV.

SAN FRANCISCO:
BANCROFT-WHITNEY COMPANY,
LAW PUBLISHERS AND LAW BOOKSELLERS.
1887.

121785

JUL 29 1942

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VOL. LXXXV.

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AMERICAN DECISIONS.

VOL. LXXXV.

CASES
IN THE
SUPREME COURT
OF
CALIFORNIA.

LEWIS v. JOHNS.

[24 CALIFORNIA, 38.]

ALL PROPERTY THAT CAN BE SHOWN TO BELONG TO SEPARATE ESTATE OF WIFE, by satisfactory testimony, whether real, personal, or mixed, and all the rents, issues, profits, and increase thereof, are, under the constitution of California, sacred to the use and enjoyment of the wife, and cannot be held to answer for the debts of the husband.

NO LEGAL OR BENEFICIAL INTEREST IN TITLE, USE, OR ENJOYMENT OF WIFE'S SEPARATE PROPERTY passes to the husband, and her right of property therein after coverture is co-extensive with that which she possessed as a *feme sole*.

LEGISLATURE MAY ENACT LAWS FOR FURTHER ASSURANCE OF WIFE'S RIGHT IN HER SEPARATE PROPERTY by throwing safe-guards around the *jus disponendi*, but cannot so legislate as to impair it in any degree.

HUSBAND CANNOT ACQUIRE INTEREST IN SEPARATE ESTATE OF WIFE by any independent act of his, nor by his supervision or labor can he acquire any interest in the increase thereof.

WIFE IS UNDER NO OBLIGATION TO COMPENSATE HUSBAND FOR HIS SUPERVISION OR LABOR upon her separate property in the absence of an express agreement to that effect.

ACTION for damages. The opinion states the case.

W. S. Long, for the appellants.

W. H. Rhodes, for the respondent.

By Court, SANDESON, C. J. William G. Chard, — the father of Anita Lewis and Joseph W. Chard, the first being a married woman, and the latter a minor, plaintiffs and appellants in this case, — in consideration of natural love and affection, conveyed to his said children the tract of land described in the

complaint, in December, 1860. After the conveyance, Anita Lewis, and her husband, E. J. Lewis, moved upon the land in question, and resided on it from that time until the commission of the trespass alleged in the complaint, cultivating and farming the same. In 1862, a crop of wheat was raised upon about 130 acres of the land, amounting, as charged in the complaint, to about four thousand bushels. At the time of the alleged trespass, about forty acres of this crop was cut and lying on the field, and the remainder standing ready to be harvested. When in this condition, the crop was levied upon by the respondent, S. D. Johns, sheriff of the county, at the suit of his co-defendants against the husband, E. J. Lewis, alone, and upon his separate liability. Anita Lewis and Joseph W. Chard, by his guardian *ad litem*, William G. Chard, sued for damages laid in the complaint at \$3,675. The case was tried by the court without the intervention of a jury.

In addition to the facts already stated, the court found that "the farming business was carried on ostensibly in the name of the husband, E. J. Lewis; that he employed men, purchased seed-wheat, and made contracts to be paid out of the proceeds of the growing crop; that he superintended the farm labor, and performed some himself; that there was no showing of any action taken by Joseph W. Chard in the business of the farm, other than the statement of the husband, Lewis, 'that the farm was carried on by his wife and Joseph W. Chard.'"

The judgment was for defendants, and plaintiffs appeal.

The court below does not find as a fact that the suits against the husband, under which the sheriff made his levy, arose out of any transactions connected with the farming business, and for the purposes of this opinion we shall assume that they did not.

The theory of the respondents is, that the crop of wheat in question, although raised upon land which was the separate estate of the wife, was the common property of both, and therefore liable to be taken in execution for the husband's debts; or if not the common property of both, the husband, at least, had some interest in the crop, which could be seized and sold under execution; and unless one branch or the other of this theory can be maintained, it is evident that the judgment must be reversed.

In *George v. Ransom*, 15 Cal. 322 [76 Am. Dec. 490], the late supreme court held that so much of the ninth section of the act defining the rights of husband and wife as declares the

rents and profits of the separate estate of the wife to be common property was in conflict with the constitution. Justice Baldwin, who delivered the opinion of the court, said: "We think the legislature has not the constitutional power to say that the fruits of the property of the wife shall be taken from her, and given to the husband and his creditors. If the constitutional provision be not a protection to the wife against the exercise of this power, the anomaly would seem to exist of a right of property in one divested of all beneficial interest; the barren right to hold in the wife, and the beneficial right to enjoy in the husband. One object of the provision was to protect the wife against the improvidence of the husband; but this object would wholly fail, in many instances, if the estate of the wife were reduced to a mere reversionary interest, to be of no avail to her except in the contingency of her surviving her husband." There the property which it was sought to subject to the payment of the husband's debts was dividends, due from a corporation to the wife, upon certain shares of stock held by her as separate estate. Although the property in the present case is different in kind, it has a common origin, and is likewise the fruit of a separate estate.

We are unable to perceive any difference in principle between the two cases. Carried to its logical conclusions, the doctrine announced in *George v. Ransom*, 15 Cal. 322 [76 Am. Dec. 490], must afford a shield to the separate estate of the wife, in whatever form it may assume, against the attacks of the husband or his creditors. Under that doctrine, all property which can be shown to belong to the separate estate of the wife, by satisfactory testimony, whether the same be real, personal, or mixed, and all the rents, issues, profits, and increase thereof, whether the same be the fruit of trade and commerce, of loans and investments, or the spontaneous production of the soil, or wrested from it by the hand of industry, is, under the constitution, sacred to the use and enjoyment of the wife, and cannot be held to answer for the debts of the husband.

The manifest object of the framers of the constitution was to protect the wife, as well during the lifetime of the husband as after his death, should she survive him, against the consequences of his improvidence or misfortune, by securing to her, separate and apart from him, such property as she may hold in her own right at the time of marriage, and such as she may afterwards acquire by gift, devise, or descent. The constitution, therefore, to that end, departs widely from the rules

of the common law, and in effect provides that the relation of the wife to her property, so far as title, use, and enjoyment are concerned, shall not be prejudiced by the fact of coverture, and that no legal or beneficial interest therein shall thereby pass and vest in the husband. In this respect it does away with the common-law results of marriage, and preserves and continues in the wife the rights of a *feme sole*, and thus presents to her, already draughted and engrossed, a marriage settlement which is more solemn than private compacts, and is beyond the reach of legislative interference. Nor can the rights thus secured be frittered away by a judicial construction, which can assign no better reason than a lingering fondness for the harsh ideas of the common law.

The wife's right of property in her separate estate after coverture is co-extensive with that which she possessed as a *feme sole*, and the legislature may, as it has done, enact laws for its further assurance (by throwing safe-guards around the *jus disponendi*), but cannot so legislate as to impair it in any degree.

It follows from what has been already said that the husband cannot, by any independent act of his, acquire an interest in the separate estate of the wife. It is even doubtful whether the legislature can confer upon him, against her consent, a dominion over her property sufficient for the purposes of management or control. However that may be, it cannot go beyond that point, as we have already seen. That the husband cannot by his management, supervision, or labor, acquire any interest in the estate itself, is conceded, and by parity of reason he cannot acquire any interest in the increase, for that is hers also, and upon the same terms,—the latter being a corollary of the former proposition. There is no magic in the touch or manipulation of the husband by force of which separate is transformed into common property. If he acquires, as is contended by respondents, any right whatever as against his wife by virtue of his supervision and labor, it is not a right, in the nature of a lien, in the thing supervised, or upon which the labor is bestowed, but merely a right to compensation, and his creditors could only proceed by the process of garnishment. In the absence of an express agreement to that effect, there is no implied obligation on the part of the wife to compensate the husband for his services, and in either case there would be only an imperfect obligation which neither the husband nor his creditors could enforce. The doctrine con-

tended for would banish the husband from the premises of the wife, and deprive her of his counsel and guidance, for his presence there might bring ruin instead of affording protection. No such alternative is contemplated by the provision of the constitution, so wisely intended for her benefit.

The judgment is reversed and a new trial ordered.

HUSBAND BY IMPROVING WIFE'S LAND WITHOUT ANY AGREEMENT WITH HER, through trustees or otherwise, that his labor and money expended thereon shall vest in him any interest therein, or entitle him to any claim against or compensation from her property, gains no right or title to her land which his creditors can reach by attachment or by the aid of a court of equity: *Webster v. Hildreth*, 78 Am. Dec. 632, and note 634; *Barleigh v. Cof. fr.*, 53 Id. 236.

MARRIED WOMAN'S POWER OVER HER SEPARATE ESTATE: See *Yale v. Dederer*, 78 Am. Dec. 216, and note 228-228; *Willard v. Eastham*, 77 Id. 366, and note 372; *Kirkpatrick v. Buford*, 76 Id. 363, and note 366.

STATUTES CONCERNING SEPARATE PROPERTY OF MARRIED WOMEN: See the note to *Kirkpatrick v. Buford*, 76 Am. Dec. 367-401.

THE PRINCIPAL CASE WAS AFFIRMED in *Lewis v. Johns*, 34 Cal. 635.

DANE v. CORDUAN.

[24 CALIFORNIA, 157.]

PARTY CONTRACTING JOINTLY WITH ANOTHER IS PRINCIPAL DEBTOR as between himself and the creditor, though he may be merely a surety for his co-debtor.

SURETY IS NOT DISCHARGED FROM HIS LIABILITY BY FAILURE OF CREDITOR TO SUE the principal debtor when requested so to do by the surety.

DECREE OF EQUITY OBTAINED AT SUIT OF SURETY, AND REQUIRING CREDITOR to sue principal debtor, is not a bar to an action against the surety, though the creditor fails to sue the principal debtor, unless the surety specifically performs the conditions imposed by the decree; and where the decree prescribes the condition that the surety tender to the creditor a sufficient amount to pay reasonable costs and expenses in the suit against the principal, a payment to the clerk and sheriff of a sufficient amount to pay their fees in the contemplated suit is not a compliance with the condition.

CREDITOR IS ENTITLED TO SELECT HIS OWN ATTORNEY, AND TENDER OF SERVICES OF ATTORNEY is not equivalent to furnishing money to pay the expense of procuring one, under a decree obtained at the suit of a surety, and requiring the creditor to sue the principal, on the surety tendering the creditor a sufficient amount to pay reasonable costs and expenses in the action.

ACTION on a promissory note against Corduan as administrator of the estate of Dehameau, deceased, who signed the

note as surety for the joint maker, Volpillac. The opinion states the case.

H. P. Barber, for the appellant.

Quint and Redmond, for the respondent.

By Court, SAWYER, J. The noted sued on was executed in favor of the plaintiff by Dehameau as surety for Volpillac, the joint maker. After the maturity of the note, the defendant, Corduan, as administrator of Dehameau, deceased, filed his bill against the plaintiff, Dane, setting up the circumstances under which Dehameau executed the note, asking a decree requiring the plaintiff, Dane, to proceed at once against the principal, Volpillac, and collect the amount due. It was accordingly decreed in this suit: "That said defendant make an immediate demand on E. Volpillac for the payment of the note executed," etc.; "that on said E. Volpillac's refusal, defendant commenced legal proceedings against said Volpillac for the payment of said note and interest . . . within ten days from the filing of this decree, or be forever debarred from claiming the same from the estate of said C. Dehameau, plaintiff, . . . on the plaintiff tendering to said defendant a sufficient amount to pay reasonable costs and expenses in the suit against E. Volpillac for the payment of the note aforesaid."

The defendant "deposited with the clerk and sheriff a sufficient amount to pay their legal fees in the proposed suit of *Dane v. Volpillac*." The defendant, by his attorney, wrote a letter to plaintiff, in which he says: "Please take notice that the clerk's and sheriff's fees are paid, and sufficient money is in their hands to pay all the costs in the suit of *E. Dane v. Volpillac*, ordered to be commenced, . . . and you are hereby tendered the services of an attorney to conduct the case." To which Dane, by his attorney, on the same day, replied: "When the order made in the case of *J. Corduan, Administrator, v. E. Dane* is complied with on your part, I shall, in all things, comply. In the conduct of any legal business which I may have, I exercise my privilege of selecting my own attorney." And he further emphatically declined the services of the attorney proffered.

"Volpillac was in the possession of and exercising rights of ownership over property of the value of from five thousand to seven thousand dollars in a store in the city of Sonora, Tulumne County, for a period of about two months subsequent

to the making of the decree aforesaid, and said property was subject to levy and attachment."

No further proceedings having been taken by either party under the decree, this suit was brought to recover the balance due on the note. The foregoing facts, among others, were set up in the answer, and having been established by evidence on the trial, the court dismissed the suit with costs, from which judgment of dismissal the plaintiff appeals, "on the ground that the decision is contrary to law and the evidence in the case, and that the defendant, not having complied with the terms of his decree, was not entitled to invoke its aid as a bar or estoppel."

On this state of facts, two questions are raised in the argument of counsel. The respondent insists:—

1. That the first suit and decree may be regarded as a formal demand made by the surety upon the creditor to proceed at once and collect the debt from the principal; and the creditor, having failed to proceed against the principal upon such request, at a time when he was solvent, the surety, by such failure, has been injured, and is exonerated.

2. That he has substantially complied with the terms of the decree on his part, while the plaintiff has failed to prosecute, as required by the decree, and he is thereby barred from recovering against the surety.

As to the first question, admitting that a request and failure to prosecute has been shown, is the security exonerated from liability? Such a state of facts did not discharge the surety in England. His remedy was to pay the debt himself, and then sue the principal; or perhaps he might, by bill in chancery, compel the creditor to proceed against the principal. Chancellor Kent says: "There is no case in the English law in which the personal application of the surety to the creditor was held to be compulsory on the creditor at the hazard of discharging the surety": *King v. Baldwin*, 2 Johns. Ch. 562 [8 Am. Dec. 424].

There was a departure from the English rule on this subject in *Pain v. Packard*, 13 Johns. 174 [7 Am. Dec. 368], and in that case the surety was held to be discharged. But this case was combated and overruled by Chancellor Kent in *King v. Baldwin*, 2 Johns. Ch. 554 [8 Am. Dec. 424]. The case was appealed, and in the court of errors reversed by the casting vote of the lieutenant-governor, who, like many senators voting on the question, was a layman. This fact detracts very much from

the weight of the decision as authority, and the arguments of Chancellor Kent in the court of chancery, and of Senator Van Vechten in the court of errors, against the principle announced in the case appear to us to be conclusive. The courts of New York have since followed the case of *King v. Baldwin*, 2 Johns. Ch. 554 [8 Am. Dec. 424], while they have disapproved of the principle established by it. Mr. Justice Cowen, in commenting on this case in *Herrick v. Borst*, 4 Hill, 656, says: "What principle such a defense should ever have found to stand upon in any court, it is difficult to see. It introduces a new term into the creditor's contract. It came into this court without precedent, was afterward repudiated even by a court of chancery, as it always has been, both at law and in equity, in England, but was restored on a tie in the court of errors, turned by the casting vote of a layman. Platt, J., and Yates, J., took that occasion to acknowledge they had erred in *Pain v. Packard*, 13 Johns. 174 [7 Am. Dec. 368], as Senator Van Vechten showed most conclusively that the whole court had done." Yet he followed the case, on the ground "that the error had become inveterate."

The courts of Pennsylvania have also followed *King v. Baldwin*, 2 Johns. Ch. 554 [8 Am. Dec. 424], but they assign as a reason for so doing, that in Pennsylvania there is no court of chancery, and the common-law courts exercise chancery powers to a very limited extent,—that for this reason a surety in that state cannot, as in other states, compel the creditor to sue the principal. He is therefore without remedy, unless he can protect himself in this mode. In some other states, *King v. Baldwin*, *supra*, has also been followed. In some, the rights and remedies of sureties are regulated by statute; and in others, the doctrine of *King v. Baldwin*, *supra*, has been entirely repudiated: *Bull v. Allen*, 19 Conn. 106; 2 Am. Lead. Cas. 270, and cases cited; 1 Parsons on Notes and Bills, 236, and notes and cases cited.

When a party contracts jointly with another, as in this case, as between himself and the creditor, he is a principal debtor,—he expressly undertakes to pay the debt. It is his duty, both morally and legally, to pay it; and we are of the opinion that the weight, both of authority and reason, is decidedly in favor of the proposition that the failure of the creditor to sue when requested so to do by the surety does not operate to discharge the surety from his liability. This was evidently the opinion of the late supreme court of this state: *Hartman v.*

Burlingame, 9 Cal. 561, and *Humphreys v. Crane*, 5 Id. 175. And there is less necessity for following a contrary doctrine in this state, for the reason that the practice act furnishes to the surety a more ample remedy than he formerly had, even in courts of equity, for he can himself bring a suit against the creditor and principal debtor and compel the latter to pay the debt: Practice Act, 527. The action contemplated by this section was doubtless intended as a substitute for the proceeding in chancery to compel the creditor to sue, and it may be doubted whether any other action by the surety against the creditor is allowed in our state.

As to the second point: admitting the decree to be sufficiently specific in its provisions to be valid, of which there is much room for doubt, we do not think the defendant complied with its terms. To render the decree available as a bar, it was necessary for him to perform specifically the conditions imposed by it; and the condition was, that he should tender "to said defendant [plaintiff in this suit] a sufficient amount to pay reasonable costs and expenses in the suit against E. Volpillac," etc. He is not at liberty to do something else, which he may deem to be equivalent to making a tender to the defendant in the decree; he must do the specific thing required by it. Paying to the clerk and sheriff a sufficient amount to pay their fees in the contemplated suit is not the same thing as tendering it to Dane: *Dubois v. Dubois*, 6 Cow. 494. Or if so, it is certainly not the same thing as tendering to Dane "a sufficient amount to pay reasonable costs and expenses in the suit," etc. There are other costs than clerk's and sheriff's fees (even admitting payment to them of their fees to be a good tender under the decree, which we are not prepared to do), such as witness and jury or referee fees, to say nothing of the expense of procuring an attorney; and the tender of the services of an attorney is not equivalent to furnishing money to pay the expense of procuring one. The plaintiff was entitled to select his own attorney: *Peck v. Acker*, 20 Wend. 605. If the defendant desired to select his own attorney, or superintend the disbursements of the costs and expenses of the suit, he could have done so by bringing his suit under section 527 of the practice act, and making the principal as well as the creditor a party. In that mode, also, he could just as well have accomplished his whole object by a single action, instead of subjecting himself and the creditor to the trouble and expense of litigating a second suit. But he has chosen to pursue

a different course, and he must rely for his discharge strictly upon the terms of his decree. Having failed to comply with those terms, the decree can afford him no protection.

Under the views we have taken of the case, the court erred in dismissing the complaint, and rendering judgment for the defendant.

There are other matters set up in the answer which may, perhaps, constitute a good defense; but they do not appear, from the transcript, to have been proved. But no point is made on these matters, and we do not pass upon them.

Judgment reversed, and the cause remanded for further proceedings.

FORBEARANCE OR DELAY IN SUING PRINCIPAL, WHETHER DISCHARGES SURETY: See *Dickerson v. Ripley County*, 63 Am. Dec. 373, and cases cited in the note 380. The principal case is cited to the point that a surety is not discharged by the failure of the creditor to sue the principal upon request, though the principal afterwards becomes insolvent, the remedy of the surety being to pay the debt, and proceed himself against the principal: *Hayes v. Josephi*, 26 Cal. 543; *Sichel v. Carrillo*, 42 Id. 500, 507.

WHETHER PERSON SIGNING AS PRINCIPAL may be shown by parol to have signed as surety only, see *Lewis v. Harvey*, 59 Am. Dec. 236, and note 292; *Burke v. Cruger*, 58 Id. 102; *Carpenter v. King*, 43 Id. 405; *McGee v. Prouty*, 43 Id. 409; *Exeter Bank v. Stowell*, 41 Id. 716; *Harris v. Brooks*, 32 Id. 254, and note 256; *Dickerson v. Ripley County*, 63 Id. 373, and note 380. The principal case is cited to the point that in an action on a promissory note against several joint makers, neither can show in defense that as between him and the other joint makers, he was only a surety; but as to the payee or holder, they are all principals: *Shriver v. Lovejoy*, 32 Cal. 577; *Damon v. Pardow*, 34 Id. 280.

ESTATE OF HARLAN.

[24 CALIFORNIA, 182.]

PROBATE COURT OF COUNTY, OF WHICH DECEDENT WAS RESIDENT AT TIME OF HIS DEATH, alone has jurisdiction of the administration of his estate, and the inclusion of the portion of the county of which he was a resident within the boundaries of a new county formed after his death, will not transfer that jurisdiction to the probate court of the new county.

RESIDENCE OF PARTY AT TIME OF HIS DEATH, AND NOT SITUATION OF ESTATE, is the test of probate jurisdiction.

PETITION for letters of administration. The opinion states the case.

Rhodes and Drake, for the appellant.

Pratt and Clarke, and E. R. Carpentier and H. K. W. Clarke, for the respondents.

By Court, SAWYER, J. George Harlan died intestate, in the county of Santa Clara, in July, 1850. Immediately before and at the time of his death, Harlan resided at the mission of San José, which was at that time in the county of Santa Clara. In March, 1853, by an act of the legislature, the county of Alameda was formed out of territory taken in part from the county of Santa Clara. The territory so taken from the county of Santa Clara included the land on which said Harlan resided at the time of his death, and the place of said Harlan's residence at that time has ever since been, and it now is, in the county of Alameda.

In June, 1863, the appellant, Charles Halsey, filed his petition in the probate court of Santa Clara County, stating, among other things necessary to entitle him to letters of administration, that Harlan died intestate in Santa Clara County, leaving real estate of great value in the county of San Francisco; that said Harlan at the time of his death was a resident of Santa Clara County, and concluding with a prayer that letters of administration be issued to him. This application was opposed by sundry parties claiming to be interested in the estates, as heirs or otherwise, on the ground, among others, that the probate court of Santa Clara County had no jurisdiction, for the reason that the place of residence of Harlan at the time of his death was no longer in the county of Santa Clara, but at the time of the said application was a part of the county of Alameda. The petition was denied on that ground alone, and the only question presented by the record is, "whether the probate court of the county of Santa Clara has jurisdiction of the estate of the said George Harlan, deceased, and can grant letters of administration upon said estate; or whether such jurisdiction is in the county of Alameda."

The act of 1850 relating to this subject provides that "letters testamentary or of administration shall be granted: 1. In the county of which the deceased was a resident at or immediately previous to his death, in whatever place his death may have happened." The same provision is contained in the act now in force.

The mission of San José continued to form a part of Santa Clara County for three years after the death of Harlan, and during all that time the only court that could take jurisdiction of the administration of his estate was the probate court of Santa Clara County. That county still exists, and its

county government has been continued to the present time. Its territorial limits have been somewhat curtailed, it is true, but its legal identity is the same. The change in boundaries cannot affect the fact that Harlan died in Santa Clara County; and this is one of the jurisdictional facts prescribed by the statute. All the jurisdictional facts, then, once existed, and the probate court of that county, upon a proper presentation of those facts, would at one time have been authorized to take, and it in fact did take, cognizance of the administration of the estate. Unless something has occurred to oust that tribunal of its right, it still exists; and we find nothing in the law withdrawing the jurisdiction from the probate court of Santa Clara County, unless the mere fact that the tract of land on which Harlan resided at the time of his death has been taken from the county of Santa Clara, and in connection with other territory erected into the new county of Alameda, works such a result. We do not see that this result necessarily follows. There is, in the nature of things, no necessary connection between the land and the jurisdiction. It was found convenient to establish some uniform test of jurisdiction, and the legislature adopted the arbitrary one of making the residence of the party at the time of his death that test, although his property might be, as in this instance, to a great extent in some other locality.

When a party dies, the jurisdiction to administer upon his estate, under the provisions of the act, becomes fixed in the county of the residence of the decedent. The legal identity of the county may continue, notwithstanding its territorial limits may be modified. In contemplation of law, the legal entity known as the county of Santa Clara is the same with that which existed prior to 1853, at the time when the *situs* of the jurisdiction upon the estate of Harlan became fixed. In organizing the new county of Alameda, no provision was made for transferring to the new county the jurisdiction to administer the estates of those who had already died in the county of Santa Clara. Provision is made for transferring certain records and certain legal proceedings of a local character from the county of Santa Clara to the county of Alameda: Laws of 1853, p. 59, secs. 16, 17. It is insisted that this case is embraced in the term "subject-matter," used in section 16. We think not. If the estate is the "subject-matter" of this proceeding, then all of the estate now remaining, and consequently the subject-matter, appears to be situate

in the county of San Francisco, and not in either of the counties of Santa Clara or Alameda. The residence of the party at the time of his death, and not the situation of the estate, is the test of jurisdiction.

The provisions of the act cited clearly do not embrace cases like the one under consideration. Had the legislature intended to include such cases, they doubtless would have made provision for them. No such provision was made, and the presumption from the fact of this omission, if any presumption can be indulged, is that the legislature did not intend to deprive the probate court of Santa Clara County of jurisdiction in those cases in which the right to take jurisdiction had already become fixed in the county of Santa Clara, by the death of a party while a resident of that county. In considering the question in the light of authority, we have found but one case directly in point. In the matter of *Bugbee v. Surrogate of Yates County*, 2 Cow. 471, the precise question arose under a similar statutory provision. A. Bugbee died while a resident of the town of Benton, in the county of Ontario. Subsequent to his death, the town of Benton, in connection with several other towns, was erected into the county of Yates. An application was made to the surrogate of the new county of Yates for letters of administration. The surrogate having doubts as to his jurisdiction, refused the letters, and the parties interested applied to the supreme court for a *writ of mandamus* to compel him to act. The supreme court held that "the surrogate of Yates County had no jurisdiction"; that "Alva Bugbee was, at the time of his death, an inhabitant of the county of Ontario, and granting letters of administration pertained to the surrogate of the latter county."

For the reasons stated, and upon the authority of the case cited, we hold that the probate court of Santa Clara County has jurisdiction, without reference to the question as to the validity of the proceedings taken in the matter of Harlan's estate in that county prior to the year 1853.

This view makes it unnecessary to consider the points made upon those proceedings, supposed to bear upon the present question.

The judgment is reversed, and the cause remanded for further proceedings.

RHODES, J., having been of counsel, did not sit in the case.

FACTS OF DEATH OF INTESTATE AND OF HIS RESIDENCE WITHIN COUNTY must exist, to give probate court jurisdiction: *Haynes v. Meeks*, 70 Am. Dec. 703.

EX PARTE YALE.

[24 CALIFORNIA, 341.]

TERMS "OFFICE" AND "PUBLIC TRUST" AS USED IN SECTION 3, ARTICLE 11 OF CONSTITUTION OF CALIFORNIA, prescribing the oath to be taken as a qualification for any office or public trust, have relation only to those persons and duties that are of a public nature.

ATTORNEY AT LAW IS NOT "OFFICER," AND DOES NOT HOLD "PUBLIC TRUST" in the constitutional sense of those terms.

MANNER, TERMS, AND CONDITIONS OF ATTORNEY'S ADMISSION TO PRACTICE, and of his continuing in practice, as well as his powers, duties, and privileges, are proper subjects of legislative control, to the same extent and subject to the same limitations as any other profession or business that is created or regulated by statute.

LEGISLATURE MAY REQUIRE AS CONDITION PRECEDENT TO ATTORNEY'S ADMISSION TO PRACTICE, or to his continuance in practice, the taking of the oath prescribed in the act "to exclude traitors and alien enemies from the courts of justice in civil cases."

MOTION to submit case on briefs. The opinion states the case.

By Court, RHODES, J. Gregory Yale, the attorney for the appellants in the case of *Lent v. Morrill*, 25 Cal. 492, now pending in this court, filed a motion in writing to submit the said case to the court on the briefs on file, which motion is as follows:—

"*Lent v. Morrill et al.*—Supreme Court, January Term, 1864. Gregory Yale, an attorney of this court, having been admitted as an attorney and counselor of this court, since its organization under the constitution of the state, and having taken the oath to support the constitution of the United States and of the state of California, and otherwise conformed to the rules of this court as an attorney, now moves the court to submit the case to the court on the briefs on file, by consent of the attorney for the respondent.

"GREGORY YALE, for appellants.

"SACRAMENTO, February 11, 1864."

Whereupon, John F. Swift, one of the attorneys for the respondent, made and filed his objection in writing to the appearance of said Gregory Yale as an attorney at law, which objection is as follows:—

"Gregory Yale, not having taken the oath prescribed by the act of the legislature, approved April 25, 1863, entitled 'An act to exclude traitors and alien enemies from the courts of justice in civil cases,' as an attorney, has no right to appear in

the above-entitled cause, for the purpose of said motion, and I object to his appearance in the capacity of attorney until he takes the said oath. JOHN F. SWIFT, for respondent."

Yale appeared in person, and having admitted he had not taken the oath prescribed by said act of the legislature to be taken by attorneys at law, contended that the act referred to in the objection interposed by Swift was unconstitutional, and therefore void.

The questions arising upon this proceeding were fully argued, both orally and in briefs, before the supreme court in the case of *Cohen v. Wright*, 22 Cal. 293; and though a very elaborate opinion was rendered by Mr. Justice Crocker, which was concurred in upon the most material points by Mr. Justice Norton, it was considered proper to permit the questions to be again argued upon the motion and objection in writing, as there was no record in this court of the motion or proceeding upon which the opinion in the case of *Cohen v. Wright*, *supra*, was rendered.

No brief has been filed by Gregory Yale, or by the attorney-general, who appeared in support of the objection of Swift, and it is not deemed necessary to discuss in detail the several propositions urged in argument, but it will be sufficient to announce the conclusions of the court upon those propositions that are decisive of the question as to the constitutionality of the act referred to, so far as the same relates to attorneys at law.

The term "office" and "public trust," as used in section 3, article 11, of the state constitution are nearly synonymous,—at least the term "public trust" is included in the more comprehensive term "office." Those duties and responsibilities of a public character that are temporarily or specially devolved upon persons, may be more appropriately denominated public trusts than offices; yet the persons discharging such duties or assuming those responsibilities are officers. The form of the oath prescribed by the constitution, as the only oath to be taken by officers and persons executing public trusts, the last part of which is: "That I will faithfully discharge the duties of the office of — according to the best of my ability," clearly indicates that the person who executes a public trust was deemed by the constitution to be an officer.

The terms "office" "office and public trust," as employed in the constitution, have relation only to those persons and duties that are of a public nature. This subject was ably considered by the supreme court of New York: *In the Matter of*

Oaths to be Taken by Attorneys and Counselors, 20 Johns. 492, in which a question arose whether the act to suppress dueling, passed in 1816, had been repealed by the constitution adopted in 1821. The oath required by that constitution was in every essential particular the same as that in ours, and was prescribed for the same class of officers. The act to suppress dueling required every officer (with certain exceptions), and every person who should be admitted as a counselor, attorney, or solicitor, to take the oath that he had not been engaged in a duel, etc. Mr. Justice Platt, in that case, says: "The point is simply whether an attorney or counselor holds an office or public trust, in the sense of the constitution. . . . In my judgment, an attorney or counselor does not hold an office, but exercises a privilege or franchise. As attorneys or counselors they perform no duties on behalf of the government,—they execute no public trust."

An officer, as defined by Webster, is "a person commissioned to perform any public duty." An attorney at law is not such an officer; and in our opinion, he is not an officer in the constitutional sense of the term, and does not hold a public trust. On this point, we fully concur with Justices Crocker and Norton in *Cohen v. Wright*, 22 Cal. 293.

The manner, terms, and conditions of their admission to practice, and of their continuing in practice, as well as their powers, duties, and privileges, are proper subjects of legislative control to the same extent, and subject to the same limitations as in the case of any other profession or business that is created or regulated by statute.

It is held by this court, in *People v. Coleman*, 4 Cal. 46 [60 Am. Dec. 581], and confirmed in many subsequent cases, that "the constitution of this state is not to be considered as a grant of power, but rather as a restriction upon the power of the legislature; and that it is competent for the legislature to exercise all powers not forbidden by the constitution of the state, or delegated to the general government, or prohibited by the constitution of the United States." There is no provision of the constitution directly restricting the legislature from exercising plenary control over the qualifications, admission, oath, or duties of attorneys at law, and in our opinion, no such restriction arises by implication; and it therefore follows that the legislature may lawfully require, as a condition to their admission to practice, or their continuance in practice, the taking of the oath prescribed in the act under consideration,

or at their pleasure may dispense with all conditions and oaths.

It is therefore ordered that the said objection of the said Swift be sustained, and that the said Gregory Yale be not permitted to practice in this court as an attorney at law, until he shall have taken and filed in the office of the county clerk of the county in which he resides the oath prescribed for attorneys at law in the above-mentioned act.

WHAT IS "OFFICE."—This subject is fully treated in the note to *Shelby v. Akora*, 72 Am. Dec. 179-189; attorneys at law: 72 Id. 184.

LICENSE TO PRACTICE LAW IS NOT CONTRACT, but a mere naked grant of a privilege which the state may revoke, or upon the exercise of which it may impose such conditions as are deemed proper, or as are demanded by the public interest: *Simmons v. State*, 49 Am. Dec. 131. And accordingly, an act imposing a tax on lawyers was held to be constitutional: *Id.*

ASHLEY v. VISCHER.

[24 CALIFORNIA, 322.]

MAKE RECEIPT FOR MONEY IS NOT CONTRACT, AND DOES NOT IMPORT PROMISE, obligation, or liability; and an action thereon is therefore barred in two years by the statute of limitations.

RECEIPT FOR MONEY STATING THAT MONEY IS TO BE APPLIED TO ACCOUNT OF PERSON from whom it is received, partakes of the double character of a receipt and contract, and shows upon its face a liability to account, and an action thereon is not barred by the statute of limitations until the expiration of four years.

ACTION by Ashley, administrator of the estate of John Morrison, deceased, against Vischer, commenced on the 23d of February, 1859. The opinion states the case.

Henry H. Haight, for the plaintiff and appellant.

Sidney L. Johnson, for the defendant and appellant.

By Court, SAWYER, J. The question in this case is, whether under the statute of limitations the two causes of action set out in the complaint are barred in two or four years. The following are the instruments to be construed:—

"Received of John Morrison, Esq., the sum of two thousand seven hundred and fifty dollars. San Francisco, February 24, 1855.

"(\$2,750.)

EDWARD VISCHER."

"This is to state that I am holder of three checks on Page, Bacon, & Co. (viz., \$380.70, \$514.40, \$227.44), amounting to eleven hundred and twenty-two dollars and sixty-three cents, to be converted into cash as best possible, and to be applied to the account of John Morrison. San Francisco, February 24, 1855.

"(\$1,122.63.)

EDWARD VISCHER."

The court below held that an action to recover the money referred to in the first instrument was barred in two years; in the last, not till four years; and accordingly entered judgment in favor of defendant on the first and against him on the second. Both parties have appealed.

A party may commence, "within four years, an action upon any contract, obligation, or liability, founded upon an instrument in writing; . . . within two years, an action upon a contract, obligation, or liability not founded upon an instrument in writing, except an action on an open account for goods, wares, and merchandise, and an action for any article charged in a store account": Wood's Digest, p. 47, sec. 17.

The first instrument is a receipt for a specified sum of money,—a mere naked acknowledgment that so much money had been received. There is no contract connected with it, — no promise or undertaking in regard to it. It is a mere naked acknowledgment, without any intimation as to the character in which the money was received, or of any intention or purpose with respect to its future disposition. It does not appear to whom the money belonged. As an instrument of evidence, a mere receipt is governed by rules different from those applicable to other writings expressing contracts or obligations; and this fact serves to illustrate the character of the instrument under consideration. As an acknowledgment of payment or delivery, it would be merely *prima facie* evidence of the fact, and not conclusive. The fact it recites might, therefore, be contradicted by other evidence. A receipt may have connected with it—embodied in the same instrument—a contract to do something else; and in that case, it would possess a double character. As a receipt, it might be contradicted; while as a contract, it would stand on the footing of all other contracts in writing, and could not be contradicted or varied by oral testimony: 1 Greenl. Ev., sec. 305. And the reason why a different rule of evidence is applied to a mere receipt seems to be because it is not in any sense a contract, as it does not express or import a promise, obligation, or liability. It is

an admission only, upon which other parties do not ordinarily act, and are not liable to act to their prejudice: *Id.*, sec. 212; 1 Phill. Ev. 474, note 131.

Professor Parsons says: "A receipt for money is peculiarly open to evidence. It is only *prima facie* evidence either that the sum stated has been paid, or that any sum whatever was paid. It is, in fact, not regarded as a contract, and hardly as an instrument at all, and has but little more force than the oral admissions of the party receiving. But this is true only of a simple receipt. It often happens that a paper which contains a receipt, or recites the receiving of money or of goods, contains also terms, conditions, agreements, or assignments. Such an instrument, as to everything but the receipt, is no more to be affected by extrinsic evidence than if it did not contain the receipt; but as to the receipt itself, it may be varied or contradicted by extrinsic testimony, in the same manner as if it contained nothing else": 2 Parsons on Contracts, 68.

In the instrument under consideration, no promise or obligation is expressed. Unless a promise or obligation is implied by law from the mere acknowledgment of the receipt of the money, no liability is imported on the face of the instrument.

Mr. Phillips, in his work on evidence, vol. 3, p. 426, edition of 1859, says: "In order to recover under a count for money lent, it will not be sufficient merely to prove the receipt of money from the plaintiff by the defendant, since the presumption of law is, that money, when paid, is in liquidation of an antecedent debt." And several authorities are cited where money had been paid on checks: See also *Headley v. Reed*, 2 Cal. 325; 1 Greenl. Ev., sec. 38, and cases cited. The principle applicable to checks is the same as in this case, for it matters not whether the evidence is a check or a written acknowledgment of the receipt of the money, so long as the evidence only extends to the fact of the receipt of money from one party by another.

All this instrument shows is the receipt of money from Morrison by the defendant,—precisely what is stated in the rule as laid down by the authorities cited. Under this rule (and we think it correct), no promise or obligation is imported by the instrument. No liability can fairly be implied from its terms. If there was any contract, or promise, or liability, it arises from facts entirely outside of this receipt. By itself, it

is not evidence of a debt. It does not acknowledge or state a fact from which the law implies an obligation, and we do not think that a liability can be said to be "founded upon an instrument of writing," from the terms of which the law does not, *prima facie*, imply any liability whatever. The first cause of action is therefore subject to the two years' limitation, and is barred.

Second.—The second instrument contains these words: "To be converted into cash as best possible, and to be applied to the account of John Morrison." This, in our opinion, goes beyond the mere acknowledgment of the receipt of money. It indicates to whom the money belongs, and contains a promise to apply it to the account of John Morrison. It is true, the instrument does not state the condition of that account,—whether Morrison is already indebted to defendant or not, or if so, to what amount. But whatever the state of the account between them may be, the fair construction of the instrument is, that it was Morrison's money, and that Vischer was to account to him for it. The instrument shows upon its face a liability to account, and this action seeks to enforce that liability.

In the case of *Sannickson v. Brown*, 5 Cal. 57, a number of accounts for labor and services, and for goods and materials furnished for the use of defendants, under the name of the "Laura Virginia Association," had been presented to the board of trustees, and allowed. The board had written thereon the words "audited and approved," and "we certify the above to be correct." The court held that these accounts, thus indorsed, constituted instruments of writing within the meaning of the statute.

So in *Neighbors v. Simmons*, 2 Blackf. 75, an account had been presented against the defendant, upon which he had indorsed these words: "I acknowledge this account to be just, and appended his signature. This was held to be an instrument in writing within the meaning of the statute of limitations of Indiana.

In *Raymond v. Simonson*, 4 Blackf. 85, the court say: "This suit is bottomed on written receipts. These receipts are very special; they clearly show the trust, and acknowledge the claim; they distinctly state that he, John H. Rackafellow, the guardian, received the several sums of money of the said administrator, Kizer, for the use of Joseph Russell, as guardian for said Joseph, etc. These receipts are, without controversy, in-

struments of writing within the saving clause of the statute." The receipts were signed by the defendant.

In these cases there was no express promise to pay,—no obligation in express terms assumed; but in each there was a state of facts acknowledged in writing to exist, which imported an obligation to pay,—from which the law itself implied a liability, and they were held to be instruments in writing within the meaning of the respective statutes of limitations under which they arose.

In our judgment, the instrument under consideration presents quite as strong a case as those just cited. It partakes of the double character of a receipt and contract. The defendant expressly undertakes to apply the proceeds to the account of John Morrison; and although the state of the account between the parties is not shown, yet the instrument does show that the money belonged to Morrison, and that defendant was liable to account to him for it.

The state of the accounts would have to be adjusted on the trial; but a liability to account is shown,—and in our judgment the liability is founded upon an instrument in writing within the meaning of the act, and the action was not barred till four years had expired. The record shows that the whole amount was, in fact, due from the defendant to the estate of Morrison.

The judgment is therefore affirmed, each party to pay one half the costs.

RECEIPT IS NOT CONTRACT, AS GENERAL RULE, but may be so drawn as to constitute a contract: *Priddle v. Kent*, 71 Am. Dec. 327. An acknowledgment, presenting a double aspect, firstly, as a simple receipt for money, and secondly, as constituting a part of a contract, in the first aspect, and for collateral purposes, such as the recovery of the money, may be contradicted; but in the second aspect, and for the purpose of defeating the operation of the contract, cannot be contradicted: *Young v. Mut. Life Ins. Co.*, 2 Saw. 329, citing the principal case.

WIXON v. BEAR RIVER AND AUBURN WATER AND MINING COMPANY.

[24 CALIFORNIA, 367.]

MATTERS NOT EMBRACED IN GROUNDS OF APPEAL SET FORTH IN STATEMENT ON APPEAL will not be noticed by the appellate court.

APPROPRIATOR OF WATER OF STREAM IN MINERAL REGION FOR MINING PURPOSES, who constructs in the stream a reservoir, has no right to run out the water accumulated therein, carrying with it sand and sediment,

upon the premises of a lower proprietor upon the same stream to the injury of his garden and fruit-trees, where he appropriated the premises for garden and orchard purposes prior to the construction of the reservoir.

APPROPRIATOR OF WATER OF STREAM IN MINERAL REGION FOR MINING PURPOSES takes it subject to the rights of a prior appropriator of land for agricultural purposes, and is liable for injuries resulting to the premises from his use of the water.

RIGHTS OF MINERS AND PERSONS OWNING DITCHES CONSTRUCTED FOR MINING PURPOSES are not paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition.

ACTION for injunction and damages. The plaintiff alleged that in 1854 he inclosed with a fence a tract of land containing about two acres, and planted it with fruit-trees, and since that time had raised vegetables and strawberries thereon for the use of his family; that the defendant was the owner of a ditch conveying water from Bear River, for mining purposes, and passing a short distance above the plaintiff's field; that in 1856 the defendant constructed a reservoir about half a mile above the plaintiff's orchard, across the ravine upon which the orchard bordered, and into this reservoir the defendant turned and accumulated the water flowing from the ditch; that the water flowing in the ditch contained large quantities of mud and sediment, which settled in the reservoir; that since the year 1860, the defendant had been in the habit of once a week opening the gate of the reservoir and allowing the water accumulated therein to rush out and carry with it the mud and sediment, which flowed over and upon the garden, and injured and destroyed the fruit-trees, fruit, and vegetables. The answer averred that the land of the plaintiff was public land, in the mineral region, and contained valuable mines of gold; that it was situated along and across a ravine which was a natural watercourse, and that for a long time the defendant had been in the habit of using the ravine for the purpose of conveying the water of its ditch to the mines below; that the injury to the plaintiff's garden, if any, had been caused by miners digging up the bed of the ravine above the garden, and by obstructions placed in the ravine below the garden; and that the defendant was engaged in selling water to miners for mining purposes, and had a right to the use of the ravine as a channel for the conveyance of its water. The jury returned a verdict for the plaintiff for damages, and the court decreed a perpetual injunction restraining the defendant from allowing the water, or mud, or sediment from its reser-

voir to flow down upon the plaintiff's garden so as to injure it. The court instructed the jury, that "if the plaintiff was in possession of his premises before the construction of the defendant's reservoir, then the defendant has no right to run out the water accumulating therein carrying with it sand and sediment, on to the plaintiff's premises, and to his injury; and if defendant has done this, you will find for plaintiff. If the plaintiff possessed his premises prior to the appropriation of the water of the ravine by defendant, then the defendant's appropriation was subject to the prior rights of the plaintiff, and if this is so, then the defendant is liable for injuries resulting to the plaintiff's premises from its use of such water subsequently appropriated." To these instructions the defendant excepted; and also to the refusal of the following instructions, requested by the defendant: "If the jury find that defendant is a company for the purpose of supplying water to miners for mining purposes, and that the premises and ravine mentioned in this case are within the mining district of this state, then the defendant has the right to appropriate, by means of a reservoir or otherwise, the natural waters of Miners' Ravine, and also the right to the necessary means for such enjoyment. The plaintiff cannot, by appropriation of land or otherwise, prevent the free flow of water and tailings in a natural ravine situated in a mineral district; and any improvements created or erected in the channel of a ravine must be subject to the right of miners upon the ravine, and also the right of defendant to a free enjoyment of its right, and a free and unmolested flow of water. All miners, and defendant as a company organized for mining purposes, have the right to the free use and benefit of natural watercourses and reservoirs, and the plaintiff has no right to interfere, in any manner, with such right; and if by reason of plaintiff's interference with the free use of the reservoir he has suffered injury, defendant is not responsible. The right to use and enjoy the ravine and its privileges, carries with it the right to such privileges as are necessary to the enjoyment of the right." The only grounds of appeal set forth in the statement are as follows: "The court erred in giving instructions to the jury which were excepted to by the defendant, and also erred in refusing to give the instructions requested by the defendant."

A. S. Higgins and S. Heydenfeldt, for the appellant.

Tuttle and Hillyer, for the respondent.

By Court, SANDERSON, C. J. We cannot notice the argument of counsel for appellant as to the sufficiency of the evidence to sustain the verdict, nor as to the question of costs, nor the correctness of the decree for an injunction, because they are not embraced in the grounds of appeal set forth in the statement: *Barrett v. Tewksbury*, 15 Cal. 354; *Reynolds v. Lawrence*, 15 Id. 359. Under the rule laid down in those cases, we can only consider the points made upon the instructions given and refused by the court.

Nor do we deem it necessary to notice in detail the instructions of which the appellant complains. It is sufficient to say that, after a careful examination, we are satisfied they correctly present the law applicable to the facts, and to the legal effect of which they are addressed.

As to the instructions asked for by the defendants: The first was properly refused, because it is so broad and unqualified in its terms that it might have misled the jury. As an abstract proposition even, it is too general, because it ignores entirely the idea of prior vested rights in others, to which the right claimed by defendant might be subordinate; and as applicable to the particular facts of this case, it ignores entirely the prior rights of the plaintiff, and by necessary implication negatives the idea that he had any such rights; thus striking from under it the very foundation upon which his cause of action rested, although such rights were conclusively established by the testimony.

The second instruction is undoubtedly law, but it had already been twice given in substance, and that was doubtless the reason why it was refused.

The four remaining instructions refused by the court are founded upon the theory that, in the mineral districts of this state, the rights of miners and persons owning ditches constructed for mining purposes are paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition; thus annihilating the doctrine of priority in all cases where the contest is between a miner or ditch owner, and one who claims the exercise of any other kind of right, or the ownership of any other kind of interest. To such a doctrine we are unable to subscribe, nor do we think it clothed with a plausibility sufficient to justify us in combating it.

The judgment is affirmed.

ERRORS NOT ASSIGNED, AND NOT AFFECTING FOUNDATION OF ACTION WILL NOT BE CONSIDERED BY APPELLATE COURT: See *Parmelee v. Fischer*, 74 Am. Dec. 138; *Riggs v. Horde*, 78 Id. 584; *Graham v. McCreary*, 80 Id. 591; *Teas v. McDonald*, 65 Id. 65, and note 73; *Reimer v. Stuber*, 59 Id. 744; *Cole v. Sprowl*, 56 Id. 696; *Hillebrand v. Breuer*, 55 Id. 757; *Forsyth v. Matthews*, 53 Id. 522; *Allaire v. Hartshorne*, 47 Id. 175; *May v. State*, 45 Id. 548; *Auditor v. Woodruff*, 33 Id. 368. Error should be made apparent by the record: *Johnson v. Lightsey*, 73 Id. 450, and note 454. On an appeal from a judgment, or from an order denying a motion for a new trial, no objection or exception will be examined, except such as are included in the appellant's statement of points on which he intends to rely: *Moore v. Murdock*, 26 Cal. 524; *Burnett v. Pacheco*, 27 Id. 410, citing the principal case.

LAW OF WATERS ON PUBLIC MINERAL LANDS: See the note to *McClintock v. Bryden*, 63 Am. Dec. 92-100. Priority of appropriation is the rule of property in water upon the public lands of California: *Bear River etc. M. Co. v. New York M. Co.*, 63 Id. 325, and cases cited in the note 331.

CUNNINGHAM v. HAWKINS.

[24 CALIFORNIA, 408.]

RIGHT TO ENFORCE LIEN OF MORTGAGE IS BARRED BY STATUTE OF LIMITATIONS after the expiration of four years from the time when the right of action accrues on the debt secured by the mortgage.

ENTRY OF MORTGAGEE INTO POSSESSION OF MORTGAGED PREMISES cannot, as between him and the mortgagor, operate to extend the statutory period within which an action for the enforcement of the mortgage is barred.

RIGHT OF MORTGAGOR TO MAINTAIN ACTION TO REDEEM PROPERTY FROM LIEN OF MORTGAGE is barred after the expiration of four years from the time when the right of action accrues on the mortgage debt.

RIGHT OF ACTION FOR REDEMPTION OF MORTGAGED PROPERTY FROM LIEN OF MORTGAGE, when barred by the statute of limitations, cannot be revived by an offer of the mortgagor to pay the debt.

MORTGAGOR'S RIGHT OF ACTION ON DEBT, AND TO ENFORCE MORTGAGE given to secure it, and the mortgagor's right of action for the redemption of the property from the mortgage lien, are mutual and reciprocal, and when one is barred by the statute of limitations, the other is also.

ACTION to redeem mortgaged property. The opinion states the case.

Williams and Johnson, for the appellant.

Vandief and Haymond, for the respondents.

By Court, CURREY, J. The complaint in this case is in equity, to redeem certain property in Sierra County from the lien of a mortgage executed on the thirteenth day of May, 1856, by one James H. Bartlett to the firm of Raskt & Co., of which the defendant was a member, to secure the payment

of a debt then due said firm from said Bartlett, and also for an account of the issues and profits of the premises received by the defendant during the time he had the possession of the premises, which was from the date of the mortgage.

The instrument denominated a mortgage purports to be a conveyance from Bartlett to Raskt & Co. of one fourth of certain mining ground described therein. Nothing appears upon the face of this instrument to indicate its character as a mortgage, except that the consideration expressed is a certain sum of money, "with interest from date till paid." But the plaintiff alleges in his complaint that it was intended and understood by the parties thereto as a mortgage to secure the payment of the sum mentioned in it as the consideration, with interest, and that the mortgagees entered into the possession of the property under the mortgage to hold the same in trust for the mortgagor.

It is alleged by the complaint, that at the time of commencing the suit, and for some time before then, the defendant claimed to be the owner and holder of the mortgage and the debt thereby secured, and during all that time had possession of the premises by virtue of the mortgage; and that on the first day of August, 1861, Bartlett conveyed all his right, title, and interest in said property to the plaintiff, who afterward, in the same month, exhibited his deed of conveyance to the defendant, and offered, for the purpose of redeeming the property from the lien of the mortgage, to pay the amount due thereon, but that defendant refused to accept payment, and that the same offer had since then been often repeated, and had been met by a like refusal by the defendant; that at the commencement of the action, the defendant was in possession of and holding the premises adversely to the plaintiff, and was taking gold therefrom. The complaint concludes with a prayer for an accounting and redemption of the premises, and for general relief.

The defendant, by his answer, alleges that he had been in the possession of the premises ever since the date of said instrument, as the owner thereof, and that for more than five years he had been working and improving said mining ground, and had expended in such work and improvements during that time the sum of seven thousand dollars, and that he had never as yet received anything whatever of value from said premises. The material allegations of the complaint, except the possession and adverse holding of the premises by the defendant, are

denied by the answer. And as an affirmative defense, the defendant pleads that neither the plaintiff nor his grantor was seised or possessed of the premises within five years next before the commencement of the action, and also that the plaintiff's alleged cause and causes of action did not accrue within four years next before the commencement of the suit; and he therefore averred that all the causes of action alleged in the complaint were barred by the statute limiting and defining the time of commencing civil actions.

There was evidence produced on the trial before the court tending to prove the principal averments of the complaint.

When the plaintiff had closed his case, the defendant moved the court to nonsuit the plaintiff, and to order the action dismissed, on the ground that the complaint and proofs showed that plaintiff's right of action was barred by the nineteenth section of the statute before mentioned. The court sustained the motion, dismissed the complaint, and gave judgment in defendant's favor for his costs. The plaintiff, by his appeal, seeks a reversal of this judgment.

The questions to be determined in this case arise upon the statute of limitations; and in their consideration we shall assume, without comment, that the instrument described in the complaint, and denominated a mortgage, was intended as such by the parties thereto at the time of its execution. The counsel for the respective parties have so treated it in argument, and to have done otherwise would have been a departure from the record in the case.

The debt, to secure which the mortgage was executed and delivered, was due at the date of the mortgage, and a cause of action for its recovery, and for the foreclosure of the mortgage, accrued at that time to the mortgagees, and a corresponding right to pay the debt and redeem the property from the lien created upon it accrued at the same time to the mortgagor; and each of the parties to said instrument had the period of four years from its date in which to commence an action for the enforcement of the accrued right. The entry of the mortgagees into the possession of the premises could not, as between them and the mortgagor, invest them with any other or greater right than they would have had without such entry. The mortgage upon the land was a mere security for the debt due, and the interest of the mortgagees was a mere chattel interest: *Johnson v. Sherman*, 15 Cal. 293 [76 Am. Dec. 481]; *Calkins v. Calkins*, 3 Barb. 312.

When this action was commenced, the mortgagees' cause of action was barred by the lapse of nearly seven years after the debt became due. The fact that the debt was secured by mortgage could not affect the right of the debtor to avail himself of the statute of limitations as effectually as in a case where the debt might not be thus secured: *Lord v. Morris*, 18 Cal. 486; *McCarthy v. White*, 21 Id. 495. Nor is it claimed on behalf of appellant that the statute is not a bar in the one case equally as in the other; but it is suggested that the debtor could waive the protection of the statute, and that in the case under consideration the plaintiff, by a tender of payment to the defendant of the amount due upon the mortgage, gained the right to compel the defendant to account for the issues and profits derived by him from the property, and to deliver possession of the property to the plaintiff when the mortgage debt should be satisfied.

Upon first impressions it would seem but just to accord to a debtor, or one having assumed the debt of another, the privilege of discharging his obligation, notwithstanding the immunity afforded him by the statute of limitations; and the instances of the refusal of a creditor to accept payment of a debt barred by the statute must be exceedingly rare, and perhaps experience scarcely furnishes an instance where a debtor offers to pay a demand against which the statute has run that the creditor has refused to receive the payment in absence of a motive of greater potency than the value of the amount tendered on the one hand and refused on the other.

It does not necessarily follow that because a debt has remained unpaid until the statute of limitations has run its course, an action could not be maintained for its recovery. Whether it could or not depends upon the election of the debtor, who may insist upon the immunity afforded him by pleading it, or by proving it under a proper plea, where necessary. But the debtor has the right to avail himself of this defense, and the mortgage creditor must have, on the principle that remedies as between mortgagor and mortgagee are mutual, the reciprocal right of resisting a redemption when, under circumstances, he may deem it to his advantage to do so.

Mr. Hilliard, in his work on the law of mortgages, says: "In general, the respective rights of mortgagee and mortgagor with regard to a foreclosure on the one hand, and a redemption on the other, are treated as mutual; that is, the existence of the former is held to involve that of the latter, and *vice versa*;

and the fact that the one cannot legally be enforced under the circumstances, is regarded as sufficient to preclude the claim for the other": 2 Hilliard on Mortgages, 1. In *Caufman v. Sayre*, 2 B. Mon. 206, the court say: "The right to foreclose and the right to redeem are reciprocal and commensurable." And in *Koch v. Briggs*, 14 Cal. 262 [73 Am. Dec. 651], the court hold the same doctrine.

As already appears, the mortgagor's right to redeem the premises from the lien of the mortgage existed immediately after that instrument was executed and delivered, and his right to an action to enforce a discharge of the encumbrance was complete at that time, and so continued for four years thereafter, after which it became barred by the nineteenth section of the statute of limitations. This section is much like the fourth section of the New York statute of limitations of suits in equity, which is as follows: "Bills for relief, in case of the existence of a trust not cognizable by the courts of common law, and in all other cases not herein provided for, shall be filed within ten years after the cause thereof shall accrue, and not after."

In speaking of this statute, Mr. Justice Mason, in *Calkins v. Calkins*, 3 Barb. 310, said: "This is a very sweeping statute, and embraces, to say the least, all suits in equity where the cause of action has accrued since the passage of the statute. In short, it extends over the whole field of equitable jurisdiction." And in reference to this statute, it is said by Cowen and Hill, in their notes (1 Cowen and Hill's Notes to Phill. Ev., ed. 1850, 541), that the time of the complainant can be enlarged by no considerations except those specifically enumerated; "that neither promises, acknowledgments, nor the most solemn acts can keep the subject-matter of the bill alive."

From the case presented by the record, the defendant could not be regarded as in possession of the premises mortgaged adversely to the mortgagor, Bartlett, nor of his grantee, the plaintiff, before the time when the plaintiff exhibited his deed to the defendant and proposed paying the mortgage debt, because, as the complaint states, and as the mortgagor testified, the defendant entered into and held the possession in subordination to the title of the mortgagor: *Zeller v. Eckert*, 4 How. 296. What may be the real truth of the case in this respect, or what may be the real nature of the tenure by which defendant has held the possession, we do not undertake to

determine, except so far as may be necessary to decide the case upon the record before us.

We think the judgment of the court below was correct, and should be affirmed.

Judgment affirmed.

WHEN RIGHT TO FORECLOSE MORTGAGE IS BARRED. — That when an action on the debt is barred, the right to foreclose the mortgage given to secure it is also barred, see *Harris v. Mills*, 81 Am. Dec. 259, and note 263; *Perkins v. Sterne*, 76 Id. 72, and cases cited in the note 76. That the right of the mortgagee to foreclose the mortgage is not barred by the same lapse of time that bars an action on the debt secured, see *Wilkinson v. Flowers*, 75 Id. 78, and note 87; *Newitt v. Bacon*, 66 Id. 609, and note 615.

RIGHT OF MORTGAGEE TO FORECLOSE, AND OF MORTGAGOR TO REDEEM, ARE RECIPROCAL, and when one is barred by the statute of limitations the other is also: See *Koch v. Briggs*, 73 Am. Dec. 651, and note 656. The principal case is cited to this point in *Arrington v. Liscom*, 34 Cal. 372; *Wright v. Ross*, 36 Id. 434; *Green v. Turner*, 38 Iowa, 116.

EQUITY OF REDEMPTION IS BARRED BY LAPSE OF STATUTORY PERIOD after the maturity of the debt secured by the mortgage. The principal case is cited to this point in *Arrington v. Liscom*, 34 Cal. 369; *Millard v. Hathaway*, 27 Id. 146. But in the latter case it is said that it does not follow from the principal case that the "mortgagee loses either the power or right to accept payment of the debt after the statute has run upon it; and should he do so, then, the debt being extinguished by the payment, the land would be disencumbered by the direct force of the fact, and no bill to redeem would be either necessary or possible." Possession by the mortgagee for twenty years, without any account or acknowledgment of the mortgage, bars the equity of redemption: *Demarest v. Wynkoop*, 8 Am. Dec. 467.

REVIVOR OF DEBT BARRED BY LIMITATION BY NEW PROMISE WILL OPERATE TO REVIVE MORTGAGE by which the debt is secured: *Perkins v. Sterne*, 76 Am. Dec. 72.

ENTRY OF MORTGAGEE INTO POSSESSION OF PREMISES CANNOT INVEST HIM with any other or greater right than he would have had without such entry. The principal case is cited to this point in *Robinson v. Russell*, 24 Cal. 478.

DONAHUE v. McNULTY.

[24 CALIFORNIA, 411.]

TESTIMONY OF OFFICER WHO SELLS PROPERTY UNDER EXECUTION, AND EXECUTES DEED THEREFOR, is not admissible for the purpose of contradicting, altering, or adding to the terms of the deed.

WHERE TERMS OF DEED ARE PLAIN AND UNAMBIGUOUS, court should limit its inquiry to what the words of the deed express, without regard to any intention independent of the words.

OFFICER EXECUTING DEED OF LAND SOLD BY HIM UNDER EXECUTION must recite therein the facts constituting his authority to sell and convey; as this is essential to show a transmission of the debtor's title in the property to the purchaser.

**RECITALS IN SHERIFF'S DEED ESTOP HIM AND THOSE CLAIMING THERE-
UNDER** from denying the truth of the facts recited; but they are not
evidence against strangers, or those claiming adversely to the deed.

SHERIFF'S DEED IS NOT EVIDENCE OF PURCHASER'S TITLE against one who
is not shown upon the face of the deed to have been one of the judgment
debtors and execution defendants, and whose interest in the property is
not shown by the deed to have been sold and conveyed.

**PAROL EVIDENCE IS INADMISSIBLE TO SHOW THAT EXECUTION SALE OF
LAND** was made by virtue of any other judgment or execution than that
recited in the deed, or to show that the interest of a person in the land
was sold whose interest is not shown upon the face of the deed to have
been sold.

ACTION of ejectment by John Donahue against Thomas Mo-
nulty and others. The opinion states the case.

*Creed Haymond, and Johnson and Williams, for the appel-
lants.*

Vanclef and Bowers, for the respondents.

By Court, CURREY, J. This is an action of ejectment to re-
cover possession of the one undivided seventeenth part of cer-
tain mining ground, situate in the county of Sierra, of which
the plaintiff alleges he was the owner and in the possession in
June, 1863, and of which he was then ousted by the defend-
ants. The defendants, by their answer, deny that they wrong-
fully ousted the plaintiff; and further answering, aver that on
the 16th of October, 1861, three judgments were obtained in a
justice's court in said county against the plaintiff and others
as defendants, described as the Buffalo and Richardson Min-
ing Company; and that under executions issued on such
judgments, the right, title, and interest of the plaintiff was
sold, and afterwards conveyed by a constable to Lawrence
Nolan, one of the defendants in this action; and they further
aver that each of the defendants owned, at the time this action
was commenced, and was entitled to the possession of an un-
divided portion and interest in the premises, which portions,
in the aggregate, comprehended the entire property.

As to the title and interest of the plaintiff to the undivided
seventeenth part of the premises at the time the sale under
the executions transpired, there seems to have been no issue
made by the answer of defendants, or by the evidence adduced
at the trial.

The decision of the case, it will appear, rests entirely upon
the effect and competency, as evidence in the case, of the
judgments obtained in the justice's court and the executions
issued thereon, and the alleged sale of the plaintiffs' right,

title, and interest in the premises, and the deed executed by the constable and produced in evidence.

In each of the cases in the justice's court, John Donahue was one of the defendants, and was served with summons, and Lawrence Nolan, who became the purchaser at the sale, and is the grantee named in the deed, was also a defendant, and was served with summons. The defendants served made default, and there was no appearance in any of the cases on the part of the defendants who were not served with process. In two of the suits, judgments were entered against all the defendants who were named in the summons, and in the other, judgment was entered against all the defendants named in the summons, and also against three other persons not mentioned therein. The recitals in the deed are that a writ of execution issued out of the justice's court of a justice of the peace therein mentioned, directed and delivered to James F. Dixon, constable, commanding him that of the goods and chattels of P. Donahue, M. Donahue, L. Nolan, B. Kenrief, P. Cody, H. F. Nichols, P. Daley, J. Wiseman, R. Anderson, J. Doe, H. Hoe, and R. Roe, composing the Richardson and Buffalo company, he should cause to be made, the moneys in said writ specified; and if sufficient goods of said persons could not be found, that then he should cause the same to be made of the lands of which the last-named persons were seised; and then it is further recited in the deed: "And whereas, because sufficient goods and chattels of the last-named persons in the said writ could not be found, whereof the said constable could cause to be made the money specified in said writ, he, the said constable, did, in obedience to the said command, levy on, take, and seize all the estate, right, title, and interest of the last-named persons in and to the lands," etc., described, and "did, on the ninth day of November, A. D. 1861, sell all the right, title, and interest of the last-named persons in and to the said premises," etc., "at which sale the right, title, and interest of the last-named persons in and to said premises were struck off and sold to L. Nolan for the sum of \$562." And after these recitals follows the granting portion of the deed, whereby the constable, "By virtue of the said writ, and in pursuance of the statute in such cases made and provided, for and in consideration of the sum of money hereinbefore mentioned," grants, bargains, sells, and conveys "unto the said Nolan, his heirs and assigns, all the estate, right, title, and interest of the said persons against whom the said writ of execution has been issued as aforesaid,

of, in, and to all the following described property," and then follows a description of the property, with the usual *habendum* clause. Several of the defendants against whom judgment passed in all of the suits in the justice's court, and who were named in the executions issued on such judgments, were not named as judgment debtors in the execution recited in the deed, and two of those who were therein named were not defendants or parties in any of the judgments and executions given in evidence. It does not appear from the deed who was the judgment creditor, in the execution recited, nor what was the amount due by the judgment on which such execution was issued.

In connection with the introduction in evidence of the judgments, executions, and deed, the defendants examined the constable, who testified that he received from the justice of the peace the three executions so offered in evidence, and that he duly levied such executions on the property and mining claim described in plaintiff's complaint, including the whole of plaintiff's right, title, and interest in the same, before he sold said claims, or any part thereof, and that he sold said claims, and plaintiff's interest therein, and conveyed the same to the defendant, L. Nolan, by the deed in question, "and that such sale and conveyance was under and by authority of said executions." The plaintiff's counsel interposed objections to the judgments, executions, and deed offered and given in evidence. The objection to the deed was that it was irrelevant and inadmissible in evidence, because it was not connected with any of the judgments or executions offered in evidence; that it did not refer to any of them; and also because it did not purport to convey the property of the plaintiff, John Donahue; and further, that it did not purport to be the deed of any officer authorized by law to make such deed, and that the same was void. The court overruled this objection, and the counsel for plaintiff excepted.

When the testimony was closed, the plaintiff's counsel requested the court to charge the jury that the deed in question was not even *prima facie* evidence against plaintiff's claim of title and right of possession, unless they believed from the evidence before them that plaintiff's interest was actually sold and conveyed by the deed in evidence.

The court refused so to charge, and the plaintiff excepted.

The jury rendered a verdict for defendants, against the plaintiff, on which judgment was entered.

A motion was made for a new trial, and denied, and the appeal is from the order denying a new trial, and from the judgment.

It is not necessary, in order to dispose of this case, to determine as to the validity of the judgments obtained in the justice's court. In respect to these judgments, and the executions issued thereon, the only question necessary to be considered is, whether the deed offered and given in evidence bears any dependent relation thereto.

The deed, as we have seen, professes to have been executed by the constable, as a conveyance of the right, title, and interests of certain persons therein named in and to the premises in controversy, which were, before the date thereof, sold by the constable upon a writ of execution issued out of a justice's court, commanding the constable that of the property of certain persons therein mentioned, composing the Richardson and Buffalo company, he should cause to be made the moneys in said writ specified. The appellant was not one of the persons named in the writ recited in the deed; nor is there anything apparent on the face of the deed to warrant the intendment that the writ of execution therein mentioned was issued on any one of the judgments produced in evidence. To show that the truth was otherwise than as recited in the deed, the constable who made the sale and conveyance was examined as a witness, and testified in respect to the matter as already appears.

The testimony of the constable was not competent to establish any facts having the effect to contradict, alter, or add to the terms of this deed. In the consideration of a deed, the terms of which are plain and unambiguous, the court should limit its inquiry as to what the words of the deed express, without regard to any intention independent of the words: 2 Cowen and Hill's Notes, 3d ed., 571, and cases there cited.

Where a deed of gift imported an absolute estate in fee in the donee, and was capable of being satisfied as such, parol evidence was held inadmissible to show that the donor intended to give a life estate only, with a limitation to the defendant: *Pooser v. Tyler*, 1 McCord Ch. 18. Nor can it be shown by parol that by mistake one tract was inserted in a deed instead of another, unless it be in a suit to reform the deed and correct the mistake: *Bell v. Morse*, 6 N. H. 205; or that part of the premises described were intended to have been excepted: *Jackson v. Smith*, 12 Johns. 427; *Hovey v. Newton*,

7 Pick. 29; *Jackson v. Roberts*, 11 Wend. 426; *Locke v. Whiting*, 10 Pick. 279; or that a deed professing to convey all was intended to convey a part only: *Barkley v. Barkley*, 3 McCord, 269; *Paine v. McIntier*, 1 Mass. 69; *Child v. Wells*, 13 Pick. 121; *Gittings v. Hall*, 1 Har. & J. 14 [2 Am. Dec. 502]; *Beeson v. Hutchinson*, 4 Watts, 442. So parol evidence was held inadmissible to show that an execution, on which a levy and a sale had been made, had been withdrawn, and the levy abandoned by the plaintiff, in contradiction to the sheriff's deed, per Spencer, C. J., in *Jackson v. Vanderheyden*, 17 Johns. 168 [8 Am. Dec. 378]; or to contradict the recital or show that the land was sold under a different judgment and execution than those recited in the deed, though such evidence may be admitted to show a fraud in the sale: *Jackson v. Sternberg*, 20 Id. 50.

The rule laid down in the last two cases cited, in regard to the conclusiveness of a recital in a deed, should be limited in its operation to the party making the recital and those who claim some right and interest under the deed which contains it. The officer who makes a sale and executes a conveyance of land under and by virtue of a judgment and execution, must necessarily make some reference in his deed to the authority under which he acted, and to the character of such authority. This is essential for the purpose of showing a transmission of the debtor's title in the property to the purchaser and grantee thereof. This is done by a recital of certain facts, constitutive of the officer's authority to sell and convey. And when this is done, he and those who claim under the deed are estopped from denying the truth of the facts recited. But such a deed is not evidence of the matters recited as against strangers, and least of all, as against those who claim adversely to it: *Jackson v. Roberts*, 11 Wend. 436; *Penrose v. Griffith*, 4 Binn. 231; *Carver v. Jackson*, 4 Pet. 88.

There is nothing in the deed in question which is evidence of title in the defendants, or any of them, of the right, title, and interest of the appellant in the demanded premises, at the time it is alleged, on the part of defendants, the property of the appellant was sold; but on the contrary, the deed shows upon its face that the execution under which the property is claimed to have been sold and conveyed was not issued against the appellant as a defendant therein, and it also shows upon its face that the interest of the appellant in the demanded premises was not attempted to be sold or conveyed.

The objection to the deed was well taken, and should have been sustained; and the instruction which the plaintiff requested the court to give to the jury was proper, inasmuch as the deed and the testimony of the constable was received in evidence.

Upon the facts of the case as they appear in the record, the appellant was entitled to a verdict and judgment, as demanded in his complaint.

The judgment is therefore reversed, and the cause remanded for a new trial.

PAROL EVIDENCE IS INADMISSIBLE TO VARY OR CONTRADICT TERMS OF DEED: *Adams v. Hudson County Bank*, 64 Am. Dec. 469, and cases cited in the note 472.

RECITALS IN SHERIFF'S DEED. — What facts should be recited: See *Jordan v. Bradshaw*, 65 Am. Dec. 419, and note 424, citing prior cases; *Bettison v. Budd*, 65 Id. 442, and note 452. Recitals as evidence of judgment, execution, levy, and sale: See *Hardin v. Cheek*, 64 Id. 600, and cases cited in the note 602; *Jordan v. Bradshaw*, 65 Id. 419, and note 424. Admissibility of parol evidence to contradict the recitals of a sheriff's deed: See *Reed v. Austin*, 45 Id. 336; *Leshey v. Gardner*, 38 Id. 764; *Summerlin v. Hesterley*, 65 Id. 639. In *Phillips v. Coffee*, 63 Id. 357, it is held that the misrecital of the judgment will not vitiate or destroy the title of the purchaser; see also the cases cited in the note thereto: 63 Id. 361; but see *Den v. Despreaux*, 22 Id. 485, and note 489. The principal case is cited to the point that the parties to a sheriff's deed, and their privies, are estopped to deny the existence of the judgment, execution, and levy recited in the deed: *Ingersoll v. Truebody*, 40 Cal. 611; *Blood v. Light*, 38 Id. 658. In *Zabriske v. Meade*, 2 Nev. 288, it is cited to the point that one who brings an action to recover real estate purchased under execution cannot show that the execution issued under a different judgment than the one recited on its face, nor can he contradict the recitals in the deed under which he claims. In *Hühn v. Peck*, 30 Cal. 289, it is said that the rule maintained in the principal case, that parties and privies are estopped by the recitals in a sheriff's deed, but that strangers are not, is entirely consistent with the idea that the recitals may be *prima facie* evidence as to them. It is also cited to the point that a sheriff's deed that does not recite the judgment on which the execution issued is void: *Wiseman v. McNulty*, 25 Id. 236.

TERRY v. MEGERLE.

[24 CALIFORNIA, 603.]

STATE OF CALIFORNIA CANNOT SELECT AND LOCATE FIVE HUNDRED THOUSAND ACRES OF LAND granted her for purposes of internal improvement by the eighth section of the act of Congress of September 4, 1841, until after the lands to be selected have been surveyed and sectionized by the proper officers of the federal government.

NO TITLE TO ANY SPECIFIC LAND CAN VEST IN STATE under the eighth section of the act of Congress of September 4, 1841, unless the land has

been surveyed by the proper officers of the federal government, and selected and located by the state in parcels conformably to sectional divisions and subdivisions of not less than 320 acres, and has upon it no subsisting valid claim by pre-emption, or otherwise, and the selection has been approved by the federal government.

STATE CAN MAKE NO VALID SELECTION OR LOCATION UPON PUBLIC LANDS OF UNITED STATES in the possession of a *bona fide* pre-emptioner under the laws of Congress, nor can it convey any valid title therein to another.

BONA FIDE PRE-EMPTIONER OF PUBLIC LAND UNDER LAWS OF UNITED STATES MAY ATTACK COLLATERALLY a patent for the same land granted by the state by virtue of a selection of the land made by the state while the pre-emptioner was in possession, in an action of ejectment against him by the state patentee, for the state had no title to the land.

EJECTMENT. The opinion states the case.

Hall and Scaniker, and G. W. Tyler, for the appellant.

Patterson, Wallace, and Stow, for the respondent.

By Court, SANDERSON, C. J. This is an action of ejectment. The case was tried in the court below without a jury. The plaintiff had judgment, and the defendant appeals. The facts as found by the court are acquiesced in by both parties, and the question to be determined is, whether the plaintiff, upon those facts, is entitled to recover the land in controversy.

The findings are as follows: "1. That in January, 1862, the plaintiff obtained from the state of California a patent for the land in controversy, pursuant to the several acts for the disposal of the five hundred thousand acres of land granted by the United States to the state of California.

"2. That the plaintiff, and those under whom he claims, have been in possession by inclosure and cultivation of all the land embraced in said patent, except the forty acres in controversy, since the year 1852, but neither he nor they have ever been in possession of any part of the land sued for.

"3. That in 1854, after the public lands, of which the premises are a part, had been divided into townships, and before they had been sectionized, the plaintiff located two school land warrants under the act of 1852. This location embraced the premises in controversy, and the lands for which the patent issued to him subsequently. The location was made by the county surveyor of San Joaquin county, by actual survey, and the survey was duly recorded in the San Joaquin county clerk's office in November, 1854.

"4. On the fourteenth day of May, 1856, plaintiff made the location and filed the warrants in the United States land-office at Marysville.

"5. The defendant, a citizen of the United States, settled upon that portion of the land in controversy which is a part of the northwest quarter of section 21, in October, 1853, and erected a dwelling-house, with intent to secure a pre-emption right to a quarter-section under the acts of Congress of September, 1841, and March, 1853. The land at that time was unsurveyed, and ever since that time defendant has occupied and cultivated that portion of the northwest quarter of said section which is now in controversy.

"6. In the month of May or June, 1855, the land was divided into sections, and other legal subdivisions, by the United States government; and the defendant, on the second day of October, 1855, filed his declaratory statement for said quarter-section in the land-office at Benicia, to which district the land belonged, the plat or survey of the land not having been entered and filed in said office.

"7. The land in controversy was afterwards transferred to the Marysville district; and the defendant, after the return of the approved plat or survey to the Marysville office, filed in that office his declaratory statement, in due form of law, on the sixteenth day of April, 1856.

"8. In 1860, at the land-office in Stockton, to which district the land then belonged, the defendant made proof of his settlement and pre-emption, and having made payment for said quarter-section, received from the register and receiver a certificate of location and purchase of the same in due form of law.

"9. One John H. Megerle, now deceased, and whose heir at law and representative is the defendant, in the month of October, 1853, settled upon that portion of the land in controversy embraced in the southwest quarter of said section 21, and erected a house thereon, intending to pre-empt the same under the laws of Congress, the land being unsurveyed public land, and continued to reside on and cultivate the same until 1858, when he died.

"10. The land being sectionized, and the plats returned to the Marysville land-office, said John H. Megerle, while yet in life, to wit, on the sixteenth day of April, 1856, filed in said Marysville office his declaratory statement for a quarter-section of land, embracing the west half of the southwest quarter of said section 21, and in April, 1859, proof was made of the entry and settlement of the said John H. Megerle, and of his notice before the proper land officers, and the defendant has

been thence hitherto ready and willing to make payment therefor.

"11. The defendant was in possession of the land in controversy adversely to the plaintiff, at the time this action was brought.

"12. That the plaintiff, claiming the quarter-section of land on which the defendant settled by virtue of his location of said school warrants, did contest the right of the said defendant before the officers of the Stockton land-office to pre-empt the same, and thereupon such proceedings were had before the officers of the government of the United States in the matter of said contest as that the Secretary of the Interior, on the ninth day of December, 1859, and again on the fourteenth day of June, 1861, did adjudge and determine that the said defendant had a valid legal right to said quarter-section under the pre-emption laws of the United States."

The eighth section of an act of Congress passed September 4, 1841, entitled "An act to appropriate the proceeds of the sales of the public lands, and to grant pre-emption rights," reads as follows:—

"Sec. 8. There shall be granted to each state specified in the first section of this act, five hundred thousand acres of land, for purposes of internal improvements; provided, that to each of the said states which has already received grants for said purpose, there is hereby granted no more than a quantity of land which shall, together with the amount such state has already received as aforesaid, make five hundred thousand acres; the selections in all of said states to be made within their limits, respectively, in such a manner as the legislature thereof shall direct, and located in parcels conformably to sectional divisions and subdivisions, of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any laws of Congress or proclamation of the President of the United States; which said location may be made at any time after the lands of the United States in said states respectively shall have been surveyed according to existing laws. And there shall be and hereby is granted to each new state that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such state before its admission and while under a territorial government, for purposes of internal improvements, as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid."

Under the last clause of the foregoing section, California, upon her admission into the Union, became vested with an interest in the public lands within her borders to the extent of five hundred thousand acres (having never received any previous grants), the same, however, to be selected and located in the manner and at the time specified in the immediately preceding part of the section, to which the words at the close of the section "to be selected and located as aforesaid," directly refer. The words "to be selected and located as aforesaid," in our judgment include both the manner and the time of the selection and location, and not the manner merely, as was held in *Doll v. Meador*, 16 Cal. 315. The language is not that the land shall be selected in the manner as aforesaid, but "as aforesaid." That portion of the section to which the words "as aforesaid" refer, prescribes, not only the manner of the selection, but the time also; and by no rule of construction can it be said that they refer to the one and not to the other. There is no ambiguity in the language used; on the contrary, the meaning is too plain and obvious to admit of doubt. The language is "located as aforesaid," that is to say, in parcels of not less than 320 acres, conformably to sectional divisions and subdivisions, and after the survey has been made. This construction is not only justified by the natural and grammatical import and meaning of the language used, but is sustained by the necessities of the subject-matter. The land must be located in parcels, conformably to sectional divisions and subdivisions, of not less than 320 acres. How can this be done until after the lands have been surveyed by the proper officers of the federal government? The grant imposes conditions as to the quantity, manner of selection, and location, and time of location, and under it no title to any specific land can vest in the state until all of those conditions have been complied with. The state has no more right to select and locate lands before the survey has been made than she has to locate it in tracts of 160 acres each, or without regard to the sectional divisions and subdivisions of the United States survey. The mode, time, and quantity of the selection and location are fixed by the act. All else is left to the legislative wisdom of the state.

Agents may be appointed by the state for the purpose of selecting and locating the land granted to the state and certifying the same by proper lists to the proper land-officers of the federal government. But such selections and locations

must be made upon lands to which there is no subsisting valid claim, by pre-emption or otherwise, or they cannot be recognized and upheld as valid by the federal government. The approval of the federal government must be had before the title of the state can attach to any specific land, and such approval ought not and cannot be had where there is a valid subsisting claim under the laws of Congress, by pre-emption or otherwise, which has attached to the land before the selection is made by the state. This course is made necessary in order to preserve uniformity in the land system of the federal government, and to enable it to preserve intact its policy toward actual settlers upon the public lands. The uniform policy of the federal government has been to invite and encourage the settlement of her public lands by a judicious system of pre-emption laws, whereby settlers are enabled to secure the title to the land cultivated and improved by them in preference to all others. A pre-emptor is as much the favored beneficiary of the federal government as a state, and equally entitled to her protection. The unoccupied land is as open to the settlement of the pre-emptor as to the selection and location of a state, and when he has once placed his foot upon the spot of his choice, he cannot be deprived of it by any system of state selection and location, provided he complies with the laws of Congress; nor need he look elsewhere than to the federal government for his title. Upon land in the possession of a *bona fide* pre-emptor the state can make no valid selection and location, nor can it convey any valid title therein to another. Such land has a prior valid claim upon it, and is not subject to state selection. Any other theory would lead to confusion and to federal and state conflict. So careful is the federal government of the rights of pre-emptioners that it has provided that where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections granted for the purposes of public schools, other lands shall be selected by the proper officers of the state in lieu thereof: Act of March 3, 1853, sec. 7; Wood's Digest, p. 749.

The sixth section of the act just cited provides, "that all the public lands in the state of California, whether surveyed or unsurveyed, with the exception of sections 16 and 36, which shall be and are hereby granted to the state for the purposes of public schools, in each township, and with the exception of lands appropriated under the authority of this act, or reserved

by competent authority, and excepting also the lands claimed under any foreign grant or title, and the mineral lands, shall be subject to the pre-emption law of the 4th of September, 1841, with all the exceptions, conditions, and limitations therein, except as herein otherwise provided; and shall, after the plats thereof are returned to the office of the register, be offered for sale, after six months' public notice in the state of the time and place of the sale, under the laws, rules, and regulations now governing such sales, or such as may be hereafter prescribed; provided, that where unsurveyed lands are claimed by pre-emption, the usual notice of such claim shall be filed within three months after the return of the plats of surveys to the land-offices, and proof and payment shall be made prior to the day appointed by the president's proclamation for the commencement of the sale, including the entry of such claims to be made by legal subdivisions, according to the United States survey, and in the most compact form."

Under the provisions of this section, the defendant proceeded to obtain the title of the United States to the land in controversy. He settled upon it in October, 1853, seven months after the passage of the act, with the intent to secure a pre-emption right thereto. At that time, the land was vacant and unoccupied. He erected a dwelling-house thereon, and ever since that time has resided thereon and cultivated the same. In 1854, the land was surveyed and divided into townships, and in 1855, into sections and other legal subdivisions, by the federal government. The defendant, within the time prescribed by the laws of Congress, to wit, on the sixteenth day of April, 1856, filed in the proper land-office his declaratory statement, and within the time prescribed made proof of settlement and payment of the purchase-money; and in 1860, obtained from the proper officer a certificate of location and purchase, in due form of law, of the land in controversy.

The plaintiff, on the contrary, sought to obtain title through the state, and under its laws. In 1854, after the land was divided into townships, and before it was divided into sections and other legal subdivisions, and before the plats were returned to the proper office, the plaintiff took his first step toward obtaining his title, by locating two school land warrants pursuant to the provisions of the act of the state legislature of 1852. On the fourteenth day of May, 1856, the plaintiff made his location, and filed his warrants in the United States land-office, and in January, 1862, he obtained a patent from the state for the same land.

Thus it appears that the defendant was in possession as a pre-emptioner before and at the time at which the plaintiff located his warrants; and the declaratory statement of the defendant was on file in the proper land-office before and at the time the plaintiff entered his location and filed his warrants. It further appears that under these circumstances, the plaintiff contested the right and claim of the defendant before the officers of the proper land-office, and on appeal to the Secretary of the Interior, a decision was twice rendered against him, and establishing the validity of the defendant's claim; yet, by some means which do not appear, he afterwards, and after the defendant had obtained his certificate of location and purchase from the proper officers of the federal government, obtained his patent from the state of California.

Regarding the plaintiff as the agent of the state for the purpose of selecting and locating the land in question, as is claimed by his counsel, and which we concede, he made his selection and location upon land to which the defendant's pre-emption right had already attached. This, as we have already seen, he could not do, and by his acts the state acquired no title whatever to the land in controversy, and of course could pass none to him by her patent. When two or more persons have settled upon the same quarter-sections of land, the right of pre-emption is in him who made the first settlement: Act of September 4, 1841, sec. 11. The state occupies no better or stronger position than a *bona fide* pre-emptioner; and if her selection be subsequent to that of a *bona fide* pre-emptioner, her right must yield to his.

The only question remaining is, whether under the circumstances of this case the defendant can attack the plaintiff's patent; and upon this point there can be no doubt, if our previous reasoning be correct. By his certificate of location and purchase the defendant became vested with the title of the United States to the land in question, upon which he could maintain and defend an action of ejectment under the laws of this state: Wood's Digest, p. 1044. We have also shown that the state acquired no title to the land in question by the acts of her agent, the plaintiff in this case, because, at the time of his location, the land was reserved from selection by the pre-emption laws of the United States, and that therefore the title of the state did not attach to the land in question, and nothing passed to plaintiff by her patent.

The third section of the act of the legislature which au-

thorizes the location of school land warrants, and under which the plaintiff made his location, provides as follows:—

“Sec. 3. The parties purchasing such warrants, and their assigns, are hereby authorized in behalf of this state to locate the same upon any vacant and unappropriated lands belonging to the United States within the state of California, subject to such location; but no such location shall be made unless it be made in conformity to the law of Congress, which law provides that not less than 320 acres shall be located in one body.”

By necessary implication the purchaser and his assignee is prohibited from locating the warrants upon land which is already occupied. We have therefore a case where the state has issued a patent without having any title to the land, and contrary to the provisions of one of its own statutes.

In *Patterson v. Winn*, 11 Wheat. 380, the supreme court of the United States said: “We may therefore assume, as the settled doctrine of this court, that if a patent is absolutely void upon its face, or the issuing thereof was without authority, or was prohibited by statute, or the state had no title, it may be impeached collaterally in a court of law in an action of ejectment.”

The doctrine of *Patterson v. Winn*, 11 Wheat. 380, is expressly recognized and approved in *Doll v. Meador*, 16 Cal. 324, and Mr. Chief Justice Field there said: “We admit, in general terms, the correctness of the doctrine declared in *Patterson v. Winn*, *supra*, to be the settled doctrine of the supreme court of the United States, that if a patent be absolutely void upon its face, or were issued without authority, or were prohibited by statute, or the state had no title, it may be impeached collaterally in an action of ejectment.” Subsequently, in the same opinion, Mr. Chief Justice Field declares by whom, in such cases, a patent may be impeached, and by whom not, in the following language: “Nor do we question the further proposition that the defendant might have disproved the evidence of title furnished by the patent, by showing that the land in question was not included in the act of Congress, or was within the exceptions contained in the act of this state. We only annex to the proposition the qualification that to do this he must first have brought himself in some privity with the common source of title. If he were a mere intruder, not possessing any claim of title either from the general or state government, he would not be in a position to question the regularity and cor-

rectness of the action of the officers of the state in the selection of the lands, and the issuance of the patent."

In the present case, as we have endeavored to show, we have two grounds upon which a patent may be impeached collaterally in an action of ejectment; and a party who, by reason of his privity with the common source of title, has a *status* in court which enables him to question its validity.

The judgment is reversed, and the court below directed to enter a judgment upon the findings in favor of the defendant.

SHAFTER and SAWYER, JJ., concurred specially.

IMPEACHMENT OF PATENT FOR PUBLIC LANDS: See *State v. Bachelder*, 80 Am. Dec. 410, and note 423; see also *Teschmacher v. Thompson*, 79 Id. 151, and note 162. A patent for land which shows upon its face that it is void may be assailed either directly or collaterally by any one interested in disputing its validity: *Winter v. Jones*, 54 Id. 379; *Rondell v. Fay*, 32 Cal. 362. But in order that a person may be permitted to impeach collaterally a patent issued by the state which is not upon its face void, but which has been issued without authority, the state having no title or right to make the grant, the person must himself possess a *status* authorizing him so to do. He must show that he has title to the premises, or such an interest therein, in subordination to the title wherever it resides, as will authorize him to call the true title to his aid: *People v. Stratton*, 25 Id. 251; *Carder v. Baxter*, 28 Id. 101; *Hagar v. Lucas*, 29 Id. 312; and see *White v. Allen*, 3 Or. 113; *Winter v. Jones*, 54 Am. Dec. 379. Thus a person who has secured a right of pre-emption stands in such relation to the United States government, the source of title, as enables him to attack the patent collaterally, as being void for want of power to grant the land covered by it: *Kile v. Twiss*, 28 Cal. 403; *Robinson v. Forrest*, 29 Id. 321. And so in Oregon, one who has settled on government land in compliance with the Oregon donation act while it was still government land, and before a certificate issued to another, acquires such an interest as renders him competent to set up the disqualification of the other person; but one who has no prior right or interest in the land cannot set up the disqualification of a donee: *White v. Allen*, 3 Or. 113. The above cases cite the principal case.

SELECTION OR LOCATION BY STATE OR ITS AGENTS, by virtue of the congressional grant of government lands to the state, made upon unsurveyed lands, is void, as under the act of Congress, the public lands are not open to selection or location by the state until they have been surveyed by the proper officers of the government: *Smith v. Athern*, 34 Cal. 512; *Hastings v. Devlin*, 40 Id. 363, 370; *Grogan v. Knight*, 27 Id. 520; *Toland v. Mandell*, 38 Id. 33; *Cham v. Reynolds*, 49 Id. 214; *Hastings v. Jackson*, 46 Id. 243. Nor can a valid selection be made of any specific parcel to which there is at the time a subsisting valid claim by pre-emption or otherwise: *Hastings v. Jackson*, 46 Id. 243; *Megerle v. Ashe*, 33 Id. 69; *Athearn v. Poppe*, 25 Id. 633; nor unless the selection is made in parcels, conformably to sectional divisions and subdivisions of not less than 320 acres: *Hastings v. Jackson*, 46 Id. 243; *Grogan v. Knight*, 27 Id. 521. And the state does not receive title, so as to be able to convey it, until the plat of the survey has been approved by the United States surveyor-general: *Medley v. Robertson*, 55 Id. 398. The language "hereby is granted," in the act of Congress, imports, however, a present grant. The

title to the amount of land specified in the act passes upon the admission of the new state, though "wanting identity to make it perfect,"—to attach it to a particular parcel of land; *Meyerle v. Aale*, 27 Id. 328. So in Nevada, it is held that the seventh section of the enabling act of Congress (Stat. 1864-65, p. 37, sec. 7) must be construed as a grant to the state *in present*, in the nature of a float, taking effect upon specific tracts of land as soon as the same are surveyed by the United States, and not before. And if *bona fide* settlements were made upon the sixteenth and thirty-sixth sections by pre-emptioners prior to the survey of the lands, then the title would not pass to the state, because they were otherwise disposed of, but other lands equivalent thereto were granted to the state in lieu thereof; *Layton v. Farrell*, 11 Nev. 455. The above cases cite the principal case.

MOSS v. SHEAR.

[36 CALIFORNIA, 28.]

DEPENDANT IN EJECTMENT WHO DESIRES TO SET OFF VALUE OF HIS IMPROVEMENTS AGAINST MESNE PROFITS must assert his right by proper averments in his answer, or he will be precluded from doing so at the trial.

SETTING OFF VALUE OF IMPROVEMENTS AGAINST MESNE PROFITS IN EJECTMENT CONSTITUTES COUNTERCLAIM OR SET-OFF, which, to be available as a defense, must, like any other new matter, be pleaded.

ADDING TO OR STRENGTHENING TITLE UNDER SALE FOR TAXES.—One who is under any legal or moral obligation to pay taxes cannot, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale.

ONE WHO IS UNDER NO LEGAL OR MORAL OBLIGATION TO PAY TAXES IS NOT PRECLUDED FROM PURCHASING at the tax sale, although in possession at the time the assessment was made, or when the land was sold.

ACTS OF ASSESSOR IN MAKING ASSESSMENTS FOR TAXES ARE INVALID, unless the provisions of the statute are strictly followed, and all its conditions fully complied with by him.

INVALID ASSESSMENT CONSTITUTES NO CHARGE UPON LAND, and no legal obligation is thereby imposed upon any one to pay the taxes.

ASSESSMENT IN NAME OF OWNER.—Under the California revenue act of 1854, the assessor is required to list the land in the name of the owner, when known, whether the land be vacant or occupied. If the land be listed to the owner, nothing more need be stated by the assessor.

ASSESSMENT IN NAME OF UNKNOWN OWNER, WHERE LAND IS UNOCCUPIED. Under the California revenue act of 1854, the assessor must, when the owner is unknown, and the land is unoccupied, list it as the land of a person unknown. If the land is unoccupied, and the owner unknown, both of these facts must appear in the assessor's list in order to make an assessment to an unknown owner valid. And if the land be listed as the land of a person unknown, the assessor must state that the land is so listed because the owner is unknown, and the land is unoccupied.

ASSESSMENT IN NAME OF OCCUPANT WHERE OWNER IS UNKNOWN.—Under the California revenue act of 1854, the assessor must, when the owner is

unknown, list the land, if occupied, in the name of the occupant. If the land is occupied and the owner unknown, both of these facts must appear in the list in order to make an assessment to the occupant valid. Where the land is occupied, ignorance of the true owner is a condition precedent to the validity of an assessment against an occupant; and if the land be listed in the name of an occupant who is not the owner, it must be stated by the assessor to have been so listed because the owner was unknown to him.

CHANGE OF COUNTY BOUNDARIES AFTER LAND HAS BEEN ASSESSED FOR TAXES does not affect the lien of the tax on the land; and the collector of the old county has power to sell the land to enforce the lien, where the land falls into another county by reason of such change.

TAX DEED NEED NOT CONTAIN RECITALS OF VARIOUS ACTS, required under the revenue act of 1854, showing a compliance on the part of the revenue officers with the several conditions of the statute. These acts are only required to be recited in the certificate of purchase. Their omission from the deed only affects the question of proof. If inserted in the deed, they are *prima facie* evidence; but if not inserted, they may be proved *alibet*.

TAX DEED NEED BE IN NO PARTICULAR FORM. — The statute requires only a deed of conveyance in fee-simple to the purchaser; and any deed is sufficient if, according to the rules of the common law, it will transfer the title of the former owner, and vest the estate in the purchaser, provided it recites the power under which it was made, and is accompanied by proof that the law was strictly complied with.

THE facts are stated in the opinion.

George Cadwalader and H. O. Beatty, for the appellant.

John B. Felton, for the respondent.

By Court, SANDERSON, C. J. This is an action for the possession of land, and for the recovery of mesne profits. The complaint is in the usual form, not verified. The answer contains a denial of all the material facts stated in the complaint, and an averment of title in the defendant. The plaintiff recovered judgment for the possession of the land, and two thousand one hundred dollars rents and profits.

The defendant moved for a new trial, which was denied. The appeal is from the judgment and from the order denying a new trial.

1. In support of his case, the plaintiff produced a patent from the government of the United States, and several mesne conveyances, showing a regular chain of title from the patentees to himself, and proved that the land in controversy was included within the calls of the patent and mesne conveyances, and also proved the value of the use and occupation.

The defendant, by way of set-off to the plaintiff's claim for mesne profits, offered testimony as to the value of his improve-

ments, which, upon the objection of the plaintiff, was excluded by the court. This ruling of the court is assigned as error.

No claim for improvements is made in the answer, and for that reason alone the testimony was properly excluded. A defendant in ejectment, who desires to set off the value of his improvements against the mesne profits, must assert his right by proper averments in his answer, or he is precluded from doing so at the trial. In such cases, the value of the improvements constitutes a counterclaim or set-off, and in order to make it available as a defense, it must, like any other new matter, be pleaded.

2. The defendant relied upon a tax title, in support of which he offered a tax deed from the sheriff and *ex officio* tax collector to W. M. Lent. Then a deed from Lent to John P. Shear, and a lease from John P. Shear to himself. This evidence was objected to by the plaintiff upon several grounds, and excluded by the court. Which ruling is next assigned as error.

It appears from the tax deed, which is a part of the record, that the land was listed as the land of persons unknown by the assessor, and that the same was sold for the taxes for the fiscal year 1856 and 1857. The testimony on the part of the plaintiff proved that the defendant had been in the occupation of the land since 1856. Under these circumstances, it is claimed by the plaintiff that the defendant could not strengthen his title, either by purchasing at the tax sale himself, or by suffering a stranger to buy, and then purchasing from him.

If the defendant was under any legal or moral obligation to pay the taxes, he could not, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. Otherwise, he would be allowed to gain an advantage from his own fraud or negligence in failing to pay the taxes. This the law does not permit, either directly or indirectly. On the contrary, if the defendant was under no legal or moral obligation to pay the taxes, there is no principle of law or equity which precludes him from purchasing at the sale, although in possession at the time the assessment was made or when the land was sold. Blackwell, in his work on tax titles, at page 470, uses this language: "One in possession of a tract of land at the date of the assessment may purchase at the sale, unless it appears that he was bound to pay the taxes;

in which case he can acquire no title by his purchase": *Piatt v. St. Clair*, 6 Ohio, 227; *Choteau v. Jones*, 11 Ill. 322 [50 Am. Dec. 460].

In the present case, the taxes were assessed under the revenue act of 1854: Statutes of 1854, p. 88. The sixty-fourth section of that act is in the following language: "Lands occupied by any person not the owner thereof shall be listed in the name of the owner, if known; otherwise, in the name of the occupant, who shall pay the taxes on the same; and for the taxes paid by such occupant he shall have his action against the owner." The sixty-fifth section of the same act provides that "unoccupied lands shall be listed in the name of the owner, if known; otherwise as lands of persons unknown." Thus the assessor is required to list the land in the name of the owner, when known, whether the land be vacant or occupied; but when the owner is unknown he must list the land, if occupied, in the name of the occupant; if unoccupied, he must list it as the land of a person unknown. This rule must be strictly followed by the assessor in order to impart any validity to the assessment. If the land is unoccupied and the owner unknown, both these facts must appear in the list made by the assessor in order to make an assessment to an unknown owner valid. If the land is occupied and the owner unknown, both of these facts must appear in the list, in order to make an assessment to the occupant valid; or in other words, a vacancy as to possession, and an ignorance of the true owner, are conditions precedent to the validity of an assessment against an unknown owner; and where the land is occupied, ignorance of the true owner is a condition precedent to the validity of an assessment against an occupant. If the land be listed to the owner, nothing more need be stated by the assessor; but if it be listed in the name of an occupant who is not the owner, it must be stated by the assessor to have been so listed because the owner was unknown to him; and if it be listed as the land of a person unknown, he must state the land is so listed because the owner is unknown and the land is unoccupied. Unless this care is observed, the assessment has not been made according to law, and constitutes no charge upon the land, and no legal obligation is imposed upon any one to pay the taxes. In order to impart any validity to the acts of the assessor, the provisions of the statute must be strictly followed, and all its conditions fully complied with by that officer. "In powers of this nature, a series of acts, preliminary in character, are required by law

to precede the execution of the power. Each and every step, from the listing of the land for taxation to the consummation of the title by the delivery of a deed to the purchaser, is a separate and independent fact. All of these facts, from the beginning to the end of the proceeding must exist; and if any material link in the chain of title be wanting, the whole falls to the ground for the want of sufficient authority to support it": Blackwell on Tax Titles, p. 84.

From what has been said, it follows that the defendant, notwithstanding he may have been in the occupation of the land at the time the assessment was made (the land not having been listed in his name), was under no obligation to pay the taxes, and therefore was not precluded from purchasing the tax title. Independent of this, it does not appear that the defendant was in possession at the date of the assessment. The witness who was examined upon this point says "that the defendant has been in possession since 1856." This language embraces no part of the year 1856. The assessment, if made at the time required by law, must have been made between the first Mondays of March and August of the year 1856. In either aspect, therefore, the defendant was not precluded from buying at the tax sale.

The land was assessed for the taxes in question in San Mateo County, and was sold by the tax collector of that county, and the deed in question made by him. It was proved by the plaintiff that the land, at the time this action was brought, was in the county of San Francisco. The present boundaries between the two counties were established by act of the legislature on the eighteenth day of April, 1857, and the tax sale was made in June thereafter. These facts are the foundation of the second objection to the deed, which is to the effect that the sale was illegal, admitting that all the previous proceedings were regular. If the land was in San Mateo County at the date of the assessment, a subsequent change in the county boundaries, resulting in a change or transfer of the land to another county, could not defeat the lien of the assessment, nor divest the tax collector of San Mateo of the power to enforce the collection of the taxes by sale of the land. Upon this point, Mr. Blackwell, in his work on tax titles, at page 345, remarks: "When, after an assessment is made, the county in which the proceeding was had is divided, the collector of the old county has power to sell land lying in the territory embraced in the newly created county," and cites *Devor v. Mc-*

Clintock, 9 Watts & S. 80; and adds: "This is in conformity with the general principles of law in analogous cases."

The next and last objection to the deed is, that it does not contain the necessary recitals. This objection, in our judgment, is also untenable. It is not necessary, under the act of 1854, to recite in the deed the various acts which show a compliance, on the part of the revenue officers, with the several conditions of the statute. These acts are only required to be recited in the certificate of purchase. Their omission from the deed only affects the question of proof. If inserted in the deed, the deed becomes *prima facie* evidence of the truth of the recitals, and the burden of showing that the law has not been complied with in the preliminary steps is cast upon the adversary party. But if omitted, the party offering the deed must prove, *aliunde*, all that is necessary to the validity of the sale. The statute does not prescribe the form of the deed, but simply authorizes the execution of a deed of conveyance in fee-simple to the purchaser; and its sufficiency must be tested by the principles of the common law. "Any deed which, according to the rules of the common law, would be sufficient to transfer the title of the former owner and vest the estate in the purchaser, is regarded as an operative mode of conveyance, provided it recites the power under which it was made, and is accompanied by proof that the law was strictly complied with": *Blackwell on Tax Titles*, p. 435; *Chandler v. Spear*, 22 Vt. 388; *Brown v. Hutchinson*, 11 Id. 569; *Spear v. Ditty*, 8 Id. 419; *Bank of Utica v. Mersereau*, 3 Barb. 528 [49 Am. Dec. 189].

It is not pretended that the deed, tested by the rules of the common law, is insufficient. It is good as an ordinary conveyance, and contains a recital of the power under which it was made. This is all that was necessary to entitle it to be read in evidence. In order to render it of any avail, the defendant would have been compelled to follow it up with other evidence, showing that the law had been strictly complied with. We cannot presume that he was unable to do this, and declare that therefore the deed was properly excluded.

The judgment is reversed, and a new trial ordered.

SHAFTER, J., expressed no opinion.

IMPROVEMENTS MAY BE SET OFF, WHEN: *Byers v. Fowler*, 54 Am. Dec. 271; *Kilburn v. Ritchie*, 56 Id. 326; *Keane v. Cannovan*, 82 Id. 738.

STRENGTHENING TITLE BY PURCHASE AT TAX SALE: See numerous cases cited in note to *Coze v. Gibson*, 67 Am. Dec. 455; *Lacey v. Davis*, 66 Id. 524.

and note 533; *Byington v. Booksalter*, 74 Id. 279, and note 283; *Pleasants v. Scott*, 76 Id. 403, and note 406; *Choteau v. Jones*, 50 Id. 480, and note 489; collected cases in note to *Blake v. Howe*, 15 Id. 684-690, on who may purchase at tax sale.

TAX SALE, STRICT COMPLIANCE WITH STATUTE ESSENTIAL TO VALIDITY OF: See *Mayor etc. v. Porter*, 79 Am. Dec. 686; collected cases in note to *Pleasants v. Scott*, 76 Id. 405, and *Rubey v. Huntsman*, 82 Id. 143; but see *Wallace v. Brown*, 76 Id. 421, and note 427, and *O'Neal v. Virginia etc. Bridge Co.*, 79 Id. 669, showing that the statute is directory merely, and that a substantial compliance with its requirements is sufficient.

RECITALS IN TAX DEEDS AS EVIDENCE: See collected cases in note to *Pleasants v. Scott*, 76 Am. Dec. 406; *Lyon v. Hunt*, 46 Id. 216; note to *Lacey v. Davis*, 66 Id. 533; *Long v. Burnett*, 81 Id. 420.

TAX DEED, WANT OF RECITALS IN, EFFECT OF: *Pleasants v. Scott*, 76 Am. Dec. 403; *Long v. Burnett*, 81 Id. 420. The principal case is cited in the note to *Bank of Utica v. Mercereau*, 49 Id. 232.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: An assessment will be held void, unless the statute has been at least substantially complied with: *Smith v. Davis*, 30 Cal. 539; *Tilton v. Oregon Cent. M. R. Co.*, 3 Saw. 24; *Huntington v. Cent. P. R. R. Co.*, 2 Id. 512; *People v. Sneath*, 28 Cal. 615. And no distinction is made in this respect between real and personal property: See case last cited. Party against whom a tax is lawfully levied cannot obtain any title to the property assessed by the purchase of it at a sale for the payment of the taxes which he should have discharged: *Garwood v. Hastings*, 38 Id. 223; *Reily v. Lancaster*, 39 Id. 356; *Carithers v. Weaver*, 7 Kan. 122; *McMinn v. Whelan*, 27 Cal. 300, 318; *Gray v. Larrimore*, 4 Saw. 652; S. C., 2 Abb. 558; and this rule applies to an outstanding title: *Barrett v. Amercin*, 36 Cal. 326. Neither can such a party strengthen his title by neglecting to pay the taxes, and subsequently buying from a stranger who purchased at the sale: *Carithers v. Weaver*, 7 Kan. 122; *Coppinger v. Rice*, 33 Cal. 408, 425. So a purchase of property at a sale of the same for taxes, by the agent of one in possession, or of one who should have paid the taxes either by himself or his tenants, will not affect the title thereof: *Bernal v. Lynch*, 36 Id. 146. But a naked possession implies no privity of contract with the legal owner, or duty to pay taxes; nor does it preclude him from acquiring adverse title to himself by tax deed or other conveyance: *Link v. Doerfer*, 42 Wis. 395. So where possession is held neither as a tenant, trustee nor agent of the land-owner, it can be no impediment to the acquisition of a tax title upon the land: *Curtis v. Smith*, 42 Iowa, 671; *Bowman v. Cockrill*, 6 Kan. 332. If a lot in San Francisco is assessed for a street improvement to a person by name, and not to unknown owners, a contractor cannot recover judgment against another person for the assessment: *Blatner v. Davis*, 32 Cal. 332. In *Love v. Shartzer*, 31 Id. 496, defendant offered evidence of his right to set off the value of improvements against damages due the plaintiff, but as the conditions essential to such right were wanting, it was excluded. The principal case was commented upon in *Brunn v. Murphy*, 29 Id. 323. For same case as principal one, see *Moss v. Shear*, 30 Id. 468.

LEGAL RESULTS OF CHANGE OF COUNTY BOUNDARIES, OR ERECTION OF NEW COUNTY OUT OF PART OF OLD ONE, WITH RESPECT TO WHETHER LEGAL PROCEEDINGS ARE TO BE CONDUCTED IN COURTS OF OLD OR OF NEW COUNTY.—1. *General Statements as to Effect of Dividing Counties.*—Upon

general principles of law, as well as upon the reason of the thing, if a part of the territory and inhabitants of a county or town are separated from it by annexation to another, or by the creation of a new county, the remaining part of the county or town retains all its property, powers, rights, and privileges, and remains subject to all its obligations and duties; unless some express provision to the contrary be made by the act authorizing the separation. This is a well-established principle: *School Com'rs of W. Co. v. School Com'rs of W. Co.*, 35 Md. 206; *Inhabitants of Co. of Hampshire v. Inhabitants of Co. of Franklin*, 16 Mass. 86; *Com'rs of Litchfield Co. v. Com'rs of Albany Co.*, 92 U. S. 307; S. C., 1 Wy. T. 137; *Eagle v. Beard*, 33 Ark. 497; *Askew v. Hale Co.*, 54 Ala. 643; S. C., 25 Am. Rep. 730; *Town of Depere v. Town of Bellevue*, 31 Wis. 120; S. C., 11 Am. Rep. 602; *Whitney v. Stone*, 111 Mass. 373; *Stone v. City of Charleston*, 114 Id. 214, 223. When a new county is carved out of the territory of those adjoining, it is for the legislature to determine to what extent the property or inhabitants of the detached portions shall bear the burdens of the counties to which they formerly belonged; and in the absence of such legislative provision, the new county will be entirely freed from any of the burdens of the counties from which its territory was taken: See case last cited. Where the organization of a new county is provided for by law, the acts of the officers of the old county throughout the territory designated for the new county, done after the passage of the law, and before the actual organization of the new county, are valid: *Clark v. Goss*, 12 Tex. 395; S. C., 62 Am. Dec. 531; because until the new county is actually organized the territory remains, *prima facie* at least, subject to the jurisdiction of the old county: *O'Shea v. Twohig*, 9 Tex. 336; *Clark v. Goss*, 12 Id. 395; S. C., 62 Am. Dec. 531, and note 534; *People v. McGuire*, 32 Cal. 140. On the other hand, however, the formation of a new county gives it all the jurisdiction over the territory, and the persons and property of individuals within it, both *civiliter et criminaliter*, which the old county out of which the new one was formed would have possessed had the new county never been erected: *Drake's Adm'r v. Vaughan*, 6 J. J. Marsh. 147.

2. *Jurisdiction in Criminal Cases where New County is Formed.*—Thus where a county has been divided, and a portion of its territory goes into the formation of a new county, a criminal act done before the division within the ceded territory can be prosecuted only within the new county: *State v. Donaldson*, 3 Heisk. 48. So where an offense has been committed in a county, and after its commission the county is divided, and that part of the county in which the offense was committed is created into a new county, the offense is indictable in the new county: *State v. Jones*, 9 N. J. L. 357. But where a new county is carved out of an old one, the organization of which is to be effected at a future time, the courts of the old county have jurisdiction to find indictments for crime committed in the territory of the new county between the time of the passage of the law and the actual organization of the new county: *People v. McGuire*, 32 Cal. 140. This jurisdiction, however, may be for the purposes of indictment only; for if the new county is organized, and becomes in all respects a separate jurisdiction before the defendant is tried, the jurisdiction of the old county ceases, and the case should be transmitted to the courts of the new county for trial: Id. So with respect to removal, it has been held that where the legislature, after establishing a new county, passes an act that all indictments and criminal proceedings against citizens of the new county which were pending in the courts of the old county should be transferred to the courts of the new county after a certain date, the transfer should be made though the place where the offense was committed was still in the old county after division: *State v. Hart*, 4 Ired. 222.

3. *Jurisdiction in Civil Cases where New County is Formed.* — As said before, the division of a county is not complete until a court in the new county is so far organized as to enable suits to be commenced in the new county: *Buckinghamhouse v. Gregg*, 19 *Ihd.* 401; *Milk v. Kent*, 60 *Id.* 231; *Arnold v. Styles*, 2 *Blackf.* 391. Thus, a suit commenced to foreclose a mortgage, in the proper county, will not be defeated by a subsequent division of the county: *Buckinghamhouse v. Gregg*, *supra*. So where chancery has once acquired jurisdiction of a suit and exercised it, neither a change of county boundaries, nor a change of the residence of a party litigant, can arrest the prosecution of the suit. Thus, where a decree has been rendered in a county in favor of the complainant's ancestor, respecting land situated at the time of the decree in that county, but which falls into a new county in consequence of a change of county boundaries, a bill to revive the decree, filed after the erection of such new county, should be filed in a court of the old county, as courts of the new county have no jurisdiction of the cause: *Arnold v. Styles*, 2 *Blackf.* 391. So after a legislative enactment forming a new county, but prior to the time fixed for holding the first term of court therein, an action is commenced in a court of the old county concerning the title to certain real estate lying within the new county; and subsequent to the holding of such first term, judgment is rendered therein, decreeing such title to be in a certain party to such action, the court of the old county has jurisdiction over such real estate, and its decree concerning such estate will be valid: *Milk v. Kent*, 60 *Id.* 226. And in Pennsylvania it is held that when a county is divided, and a new county formed out of one part, and the act erecting the new county makes no provision on the subject of keeping alive the lien of judgments upon lands lying in the new county, the lien of such judgments will either continue without revival, as at common law, previous to the act of 1798, or their lien will be preserved by revivals in the old county, without the service of the process in the new county: *Went's Appeal*, 5 *Watts*, 87. So with respect to the administration of estates, the same general principle has been applied. Thus jurisdiction to grant probate of a will, having once attached, cannot be defeated by a subsequent division of the county: *Lindsay's Heirs v. McCormack*, 2 *A. K. Marsh.* 229. "This case," said the court in *Drake's Adm'r v. Vaughan*, 6 *J. J. Marsh.* 147, referring to *Lindsay's Heirs v. McCormack*, *supra*, "seems to hold out the idea that the court of a new county would possess no authority to grant administration or probate, although the deceased was domiciled within the bounds of the new county at his death, where administration or probate was not granted at the time of the formation of the new county and the death happened before its formation. We concur in the correctness of that decision upon the main question, because the will had been proved in Lincoln, before Mercer County was formed. But if the will had not been in Lincoln, at the time of the formation of Mercer, we think Mercer would then have been the proper county in which to prove it. The first rule prescribed by the statute designating the proper court for taking the proof of wills is, 'If any testator shall have a mansion-house, or known place of residence, his will shall be proved in the court of the county wherein such mansion-house or place of residence is': 2 *Dig.*, ed. of 1834, 1542. Now, if a person dies within his mansion-house in the bounds of a new county, but died before it was formed, and after its formation his will is proved in the old county, then, in violation of the statute, the proof is taken by the court of the county where his mansion-house was, and not in the court of the county where the mansion-house is. Such a proceeding would be as inconvenient to the citizen as inconsistent with the letter of the law, and therefore cannot be indulged. The same rules which point out the proper

court to receive the proof of wills apply to granting letters of administration in cases of intestates."

So in California, where, after the death of the intestate, that portion of the county in which he resided at the time of his death is erected into a new county, or attached to another county, the probate court of the old county still retains its jurisdiction over the administration: *In the Matter of the Estate of Harlan*, 24 Cal. 182. It is thus clear, as appears from *Buckinghouse v. Gregg*, 19 Ind. 401, *Milk v. Kent*, 60 Id. 231, *Arnold v. Styles*, 2 Blackf. 391, *West's Appeal*, 5 Watts, 87, *Lindsay's Heirs v. McCormack*, 2 A. K. Marsh. 229, and *Estate of Harlan*, 24 Cal. 182, all cited *supra*, that the division of a county does not oust jurisdiction already attached in pending causes; and but one authority to the contrary has come under our observation, — a Georgia case, where an act of the legislature changed the territorial limits of a county in which a suit had been instituted respecting the title to certain land therein. The division threw the land into a new county during the trial of the case in the old county. Judgment was obtained in the old county, and was about to be enforced by the eviction of the parties in the new county when an injunction was sought to restrain such eviction, and the court held that it ought to have been granted, because the court of the old county was deprived of all jurisdiction over the land, the subject-matter of litigation, by reason of the land falling within the new county after division: *Kelly v. Tate*, 43 Ga. 535. As opposed to the doctrine of this case, and in conformity with the general principle above stated, stand the rulings in tax cases as promulgated in the principal and other cases. Thus where, after an assessment is made, the county in which the proceeding was had is divided, the collector of the old county has power to sell land lying in the territory embraced in the newly created county: See principal case; *Devor v. McClintock*, 9 Watts & S. 80. And where the boundary between two counties is changed, after the assessors of the townships embracing the territory transferred have made their assessments for the current year, and after the time for making and returning such assessments has passed, the new county, and not the old one, is entitled to assess, collect, and retain the taxes for that year in the transferred territory: *Board of Com'rs of Morgan Co. v. Board of Com'rs of Hendricks Co.*, 32 Ind. 234. For circumstances under which it was held that an old county could not recover the amount of taxes levied and collected in a new county partly erected out of the old one, upon the subjects of taxation in such new county, see *Trinity Co. v. Polk Co.*, 58 Tex. 321. A justice of the peace commissioned within a certain district and county cannot act under his former appointment upon a division of the county, if his district falls entirely within the new county: *Respublica v. McClean*, 4 Yeates, 399.

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[25 CALIFORNIA, 122.]

DEED REFERRING TO ANOTHER FOR DESCRIPTION, ADMISSIBILITY OF, IN EVIDENCE. — Where a deed, containing no description of the land conveyed, except by reference to another deed, is properly admitted in evidence, the one referred to should also be received for the purpose of showing a description of the land conveyed, whether it be a genuine conveyance or not. No proof of its genuineness need be made, or that there was any such person as the one purporting to have executed it, or that he had any title to the land described therein.

COPY OF DEED, CERTIFIED OR AUTHENTICATED ACCORDING TO STATUTE, IS ADMISSIBLE IN EVIDENCE under the act of 1857, where the original is lost or not under the control of the party offering the copy.

ACTUAL OCCUPANCY OF PART OF TRACT OF LAND AMOUNTS TO POSSESSION OF WHOLE TRACT WHEN. — Where one enters into actual possession of a part of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, his possession is not limited to the part actually inclosed, but extends to every part of the entire tract not in the adverse possession of another person at the time of his entry. And this rule applies to small as well as large tracts of land.

COLOR OF TITLE, WHAT IS. — One who goes upon a tract of land where there is no adverse possession, a portion of which is uninclosed, and claims the whole under a deed describing the entire tract, holds under color of title, and will prevail, in an action to recover the land, as against one who enters subsequently upon the uninclosed part of the tract.

ACQUISITION OF TITLE IN FEE TO LAND UNDER STATUTE OF LIMITATIONS. — One having open possession of part of a tract of land, and claiming the whole, where there is no adverse possession, will, by holding it for the period prescribed by the statute of limitations, acquire a title in fee thereto.

INDIANS CANNOT MAKE VALID CONVEYANCE OF ALL OR ANY PORTION OF TRACT OF LAND granted to them by the governments of Mexico and the United States, whether such attempt is made by one or more, or even all the members of the tribe. The interest of the Indians in such grants is of a public nature, for the benefit of the Indian community at large.

RIVER AS BOUNDARY LINE. — Where a river is named as a boundary line of a tract of land, the boundary line follows the meanderings of the stream. When a line is to run up or down a stream not navigable a given distance, the meanderings of the stream are to be followed until the required distance, when reduced to a straight line, is attained. And where courses are not specified, the other lines are to be run in such a manner that the land shall be in a form as nearly rectangular as possible.

SURVEY OF LAND BOUNDED ON STREAM, QUANTITY OF LAND AND LENGTH OF LINE ON STREAM BEING GIVEN, the meanderings of the stream are to be followed until, reduced to a straight line, the same will be of the required length. From the ends of this line other lines are to be projected at right angles with it, far enough so that a line drawn between the two, parallel with the straight line, will leave the required quantity between it and the stream.

SAME. — QUANTITY BEING GIVEN, WITHOUT SPECIFYING LENGTH OF LINE ON STREAM, the required quantity of land is to be located by making the first line follow the meanderings of the stream from the starting-point named in the deed until, reduced to a straight line, it shall be of sufficient length to form one side of a square large enough to contain the required quantity; and this square is to be formed by projecting straight lines at right angles from the ends of the first straight line to such a distance that a line drawn from one to the other, parallel with such first line, will include the required quantity between it and the stream.

SAME. — WHERE LINE OPPOSITE RIVER IS, BY EXPRESS TERMS OF DEED, TO RUN "PARALLEL WITH RIVER," it means parallel with the river in all its meanderings, and not parallel with its general course.

CIRCUMSTANCES UNDER WHICH JUDGMENT CANNOT BE MODIFIED. — When the complaint, evidence as admitted, the verdict, and judgment are in harmony, and the judgment is erroneous because it includes more land

than plaintiff is entitled to under a proper construction of the description thereof contained in a deed in evidence, the supreme court cannot modify the judgment without setting aside the verdict, etc., and will therefore reverse the judgment, and order a new trial.

JOINT VERDICT, AND JOINT JUDGMENT THEREON, CANNOT BE OBJECTED TO BY DEFENDANTS having separate possessions, and who have been joined as defendants in an action to recover land, where no demand was made at the close of the trial for separate verdicts, and no objection or exception was taken to the verdict on that ground in time to afford an opportunity to correct it.

NO INJURY CAN RESULT FROM JOINT VERDICT in an action to recover real estate, where no damages have been claimed.

EXCEPTIONS TO CHARGE OF COURT SHOULD POINT OUT specific portions of the charge excepted to, and should be made at the time of the trial, before the jury retires, so that the judge may have an opportunity to correct errors.

In the deed from Shaddon to Hicks, given in the opinion, reference is made to an instrument of which the following is a copy:—

“HELENO, CHIEF OF INDIANS, TO THOMAS SHADDON:—

“NEW HELVETIA, 13th May, 1848.

“Before me, John Sinclair, justice of the peace of this district, and also before the witnesses whose signatures appear at the foot of this instrument, personally appeared Heleno, chief of the Christian Indians called Moquelumnes, and declared that for himself, his heirs, and executors, and in the name of his tribe, their heirs, and executors, and all others who may claim through him or them, grants, bargains, and sells unto Thomas Shaddon, his heirs and assigns forever, a piece of land granted to them by his Excellency the governor of the department, Manuel Micheltorena, as per title issued to them the twenty-second day of December, 1844, and delivered to Augustus Sutter, he being justice of the peace and military commandant of these frontiers at that date. Said land is part of the rancho called Rancho de los Cosumnes, and conceded as above declared, consisting of one league (three miles) or five thousand square varas (yards), the boundaries of which are as follows: On the north or northwest the Cosumnes River; on the east or northeast by a line that starts from a point on the Cosumnes River called Paso Viejo (Old Pass), and runs in a line directly crossing the line of the river above referred to; on the south or southeast by a line that runs one league or five thousand varas parallel with the Cosumnes River; on the west or southwest by a line that runs one league or five thousand varas parallel with the line on the east or northeast.

“The said Heleno further declares that said property is

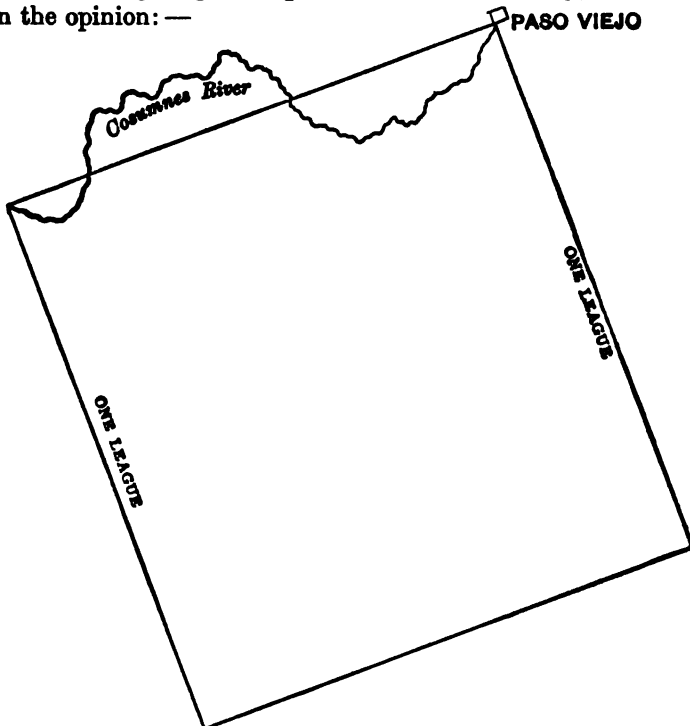
entirely unencumbered by private or public claims of any nature, and in such conception now sells it to the said Thomas Shaddon at and for the sum of two hundred dollars, the receipt whereof he hereby acknowledges for himself and in the name of his tribe, freely giving up all his claim for himself and tribe, and guaranteeing to the said Shaddon that this sale shall prove certain, sure, and effectual.

"Witness whereof he hereunto sets his hand, date as before written.

"HELENO, X Chief.

"Witness: J. A. SUTTER, J. BIDWELL, LEVI MCKINSTRY, THOMAS M. HARDY."

During the trial certified copies of the petition of J. A. Sutter to Manuel Micheltorena, governor of California, for a grant to the Moquelumne Indians, with the map accompanying the same, and the grant of Micheltorena to the Indians, dated December 22, 1844, from the office of the surveyor-general of the United States for California, were offered in evidence by the appellants, but rejected on the objection of respondent. The following diagram represents the Cleal survey, referred to in the opinion: —



Winans, Heydenfeldt, and Hartley, for the appellants.

Robinson and Beatty, for the respondents.

By Court, SAWYER, J. This is an action to recover a portion of a tract of land situate near the Cosumnes River, in Sacramento County. The entire tract claimed by Hicks is one league. The plaintiff introduced a certified copy from the records of Sacramento County of a deed from Thomas J. Shaddon to himself; also evidence showing that Shaddon had been, since 1848, and was at the time of the execution of said deed, in the actual occupancy of a part of the premises described in the complaint and deed, claiming the whole; that he had an inclosure of fifteen or twenty acres near the river, with a house on it, in which he lived, and a corral; that the rest was open and uninclosed; that he had cattle which roamed over the tract and adjoining country in connection with other cattle; that Shaddon, also, at the time the deed was executed, sold his cattle to Hicks; that Hicks bought for himself and his partner, one Martin, and had the deed made in his own name; that upon the execution of the deed from Shaddon, said Hicks and Martin entered upon the lands, receiving actual possession from Shaddon of that portion occupied by him; that they cut a ditch from a slough to the river, some eleven hundred yards, across the head of what was called "Shaddon's Pocket,"—thus inclosing between the slough, river, and ditch about a thousand acres,—but the location of the "Pocket," with reference to the calls of the Shaddon deed, is not distinctly shown; that Martin subsequently conveyed his interest to plaintiff; that at the time plaintiff and Martin entered, no one occupied any portion of Shaddon's rancho; that Hicks has continued to occupy the parts upon which he entered ever since the time of his conveyance, in 1850. There was also some testimony tending to show that there was another fence along near the road crossing the tract, and that defendant Coleman's entry was within this fence; but the evidence on this point is not very satisfactory. Coleman entered some time about a year before the trial, which was in 1858. Castle and Randolph entered upon portions of the land embraced in the calls of the deed, but not upon any portion of the lands within any inclosure made by Hicks or Shaddon.

Plaintiff had judgment, and defendants appeal.

The deed from Shaddon to Hicks, introduced in evidence, not including the instrument referred to for a description, is as follows:—

"Know all men by these presents, that I, Thomas J. Shaddon, in consideration of five thousand dollars, to me in hand paid, the receipt whereof is hereby acknowledged, bargain, sell, convey, and deliver unto William Hicks, his heirs and assigns forever, all my right, title, claim, and interest in the property described in the foregoing instrument, which is made a part hereof. And I, for myself, my heirs, etc., hereby warrant the title to said premises free from the claims of all persons claiming the same under me. Witness my hand and seal, this thirtieth day of September, A. D. 1850.

His
 "THOMAS J. X SHADDON. [L. s.]
 mark.

"Witness: LLOYD TEVIS."

This deed seems to have been written upon another instrument, which upon its face purports to be a conveyance from Heleno, chief of Mokelumne Indians, to Shaddon of a league of land therein described. This instrument, in the arguments of counsel, has been designated as the Heleno deed, and is the paper referred to for a description in Shaddon's deed as the "foregoing instrument." The first ten points made in the introductory brief of appellants relate to the objections presented in various forms to the introduction in evidence of this instrument, and in relation to other papers supposed to be referred to in it, and to its effect as evidence when introduced. The substance of the objections is, that there was no proof of its execution, that the original was not produced or accounted for, that it was not shown that there was such a person as Heleno, or that he was chief of the Mokelumne tribe, or that he had any authority to convey for his tribe or himself, or that there was any title in him or in his tribe, or that he or his tribe had any possession, etc. The plain answer to all this is, that the instrument was not offered as a deed at all, nor was any title claimed under it as such. It was only introduced as a part of the deed from Shaddon to Hicks. The deed from Shaddon to Hicks was offered and read in evidence, and this instrument having been made a part of that conveyance for the purpose of inserting a description of the land which Shaddon designed to convey to Hicks by his deed, it was, as a matter of course, necessarily read as a part of Shaddon's deed. It did not matter, therefore, whether the paper was executed or not, or whether there was or not any such person as Heleno; or if so, whether he had any title to the land. The only use made of the Heleno deed in Shaddon's

conveyance was to show what property he conveyed, and that was "the property described in the foregoing instrument." The only office the Heleno deed performs is to furnish a description of the land, and for that purpose it is not a matter of the slightest consequence whether it was a genuine conveyance or not. If Shaddon's deed to Hicks was properly admitted, then the Heleno deed was properly read in evidence as a part of that instrument.

But it is also objected that the certified copy of Shaddon's deed was improperly admitted, for the reason that the original was not accounted for. The instrument was duly acknowledged and regularly recorded. The act of 1857, concerning copies of certain instruments in writing, provides that duly certified copies of such deeds shall be received in evidence, "provided it be shown that the said originals are not under the control of the party offering the said copies, or are lost": Bancroft's Practice Act, p. 441, note 2; *Skinker v. Flohr*, 13 Cal. 638. The judge who tried the case was satisfied from the evidence that the original was not under plaintiff's control, and the evidence in the record on this point is such that we cannot say he erred. The deed from Shaddon to Hicks was therefore properly admitted in evidence.

The plaintiff relies for recovery upon prior possession, and claims that he has shown such possession. He claims that Shaddon was in the actual occupancy of the land claimed, by having a portion of it inclosed, and residing thereon, claiming the whole, using it as a range for his cattle from 1848 till 1850, when he conveyed the whole tract to plaintiff by specific boundaries; that plaintiff entered upon a part under said conveyance, and occupied it by residence and exercising other acts of ownership, claiming the whole according to the boundaries described in his deed; and there being no other person in possession adversely at the time of his entry, that these acts, under the well-settled rules of law, gave him possession of the entire tract. The appellants do not appear to controvert this proposition, provided the conveyance was such as to constitute color of title. But they insist that plaintiff claims title under the Heleno deed; and that the deed is void upon its face, for the several reasons before mentioned; and being void upon its face, the plaintiff is bound to know the fact; that knowing the invalidity of the deed, his entry is not in good faith, and there is no color of title sufficient to give him the benefit of the rules of law upon which he relies. Unfortunately for the argument,

we are not authorized to assume that plaintiff entered, or that he claims under the Heleno deed. He repudiates any such claim himself. He does not profess to trace his title beyond Shaddon, and we do not know that Shaddon claimed under the Heleno deed. He may, for aught the court can know, have had a perfect title. We do not know that there ever was a deed from Heleno to Shaddon. None was introduced in evidence as a link in plaintiff's chain of title. The instrument called the Heleno deed was not offered as a deed, or as an independent piece of evidence. It was not proved by plaintiff to have been executed by anybody, and was certainly not admitted by defendants to be a genuine instrument. We know that there was a paper with certain words written upon it; that this paper contained a description of the premises suitable for the purposes of Shaddon and Hicks, and was referred to by them for a description instead of copying the description into the deed in evidence, and this is all we know about the document.

The deed in evidence does not pretend to recite that any conveyance was ever made to Shaddon by Heleno. It does not even call this document a deed or conveyance, but simply refers to it as "the foregoing instrument." There is no recital, properly speaking, in Shaddon's deed, unless the statement of the consideration is a recital. There is nothing by deed or recital in evidence that carries us back in the chain of title beyond the deed from Shaddon, and Shaddon's occupancy of a part of the tract conveyed claiming the whole. There is nothing in evidence, then, showing the character of the title under which Shaddon claimed, except his occupancy of the land and his assuming to own it; and occupancy alone is, as was often held by the late supreme court, evidence of title in fee as against a trespasser. In these respects, then, there is a material difference between this case and the case of *Suñol v. Hepburn*, 1 Cal. 254; *Livingston v. Peru Iron Co.*, 9 Wend. 511, and other cases cited by appellants.

The deed from Shaddon to Hicks is valid upon its face, and sufficient to transfer any title Shaddon had at the date of its execution. It was sufficient to pass a fee-simple title. There was no adverse possession of the land in any other party at the time. The plaintiff entered into actual possession of a part under the deed, claiming title to the whole tract embraced within its calls; and he continued undisturbed in his claim till the entry of the defendants. Under these circum-

stances, does the actual occupancy of a part draw after it the possession of the whole?

The discussions upon this subject generally relate to adverse possession with reference to questions arising under statutes of limitations, and under acts relating to champerty and maintenance. But there must be a possession, or there can be no adverse possession; and such a possession as would be adverse within the champerty acts, or statutes of limitations, and sufficient to serve as the foundation of a title which would ultimately deprive the real owner of the land, and transfer it to the possessor, ought certainly to be sufficient to enable that possessor to maintain an action against a mere intruder on his rights.

In *Ellicott v. Pearl*, 10 Pet. 442, Mr. Justice Story, in declaring what acts are sufficient to constitute adverse possession, says: "The argument in support of the instruction as prayed assumes that there can be no possession to defeat an adverse title, except in one or the other of these ways; that is, by an actual residence, or by an actual inclosure,—a doctrine wholly irreconcilable with principle and authority. Nothing can be more clear than that a fence is not indispensable to constitute possession of a tract of land. The erection of a fence is nothing more than an act presumptive of an intention to assert an ownership and possession over property. But there are many other acts which are equally evincive of such intention of asserting such ownership and possession, such as entering upon land and making improvements thereon, raising a crop of corn, felling and selling the trees thereon, etc., under color of title. An entry into possession of a tract of land under a deed containing specific metes and bounds gives a constructive possession of the whole tract, if not in any adverse possession, although there may be no fence or inclosure around the ambit of the tract, and an actual residence only on a part of it. To constitute actual possession, it is not necessary that there should be any fence or inclosure of the land. If authority were necessary for so plain a proposition, it will be found in the case of *Moss v. Scott*, 2 Dana, 275, where the court say: 'It is well settled that there may be a possession in fact of land not actually inclosed by the possessor.'"

And again on page 443: "Pearl entered into possession of the seven-thousand-acre tract under his deed from Edwards, and as that deed described the tract by metes and bounds, Pearl must, upon the principles already stated, be deemed to

have been in possession of the whole tract, unless some part of it was, which is not shown, in the adverse possession of some other claimant. In short, his entry being under color of title by deed, his possession is deemed to extend to the bounds of that deed, although his actual settlement and improvements were on a small parcel only of the tract. In such a case, where there is no adverse possession, the law construes the entry to be co-extensive with the grant to the party, upon the ground that it is his clear intention to assert such possession. This doctrine is well settled. It was affirmed in this court in *Barr v. Grattz*, 4 Wheat. 222, 223"; and numerous other authorities are cited by the learned justice: See also *Clarke v. Courtney*, 5 Pet. 320. In these and many other cases, the questions arose between parties claiming under patents which overlapped each other, and the parties entered under a title apparently good, derived from the government. But all the cases are not of this class: *Coleman v. Wolcott*, 1 Conn. 285, 609. In *Ellicott v. Pearl*, 10 Pet. 442, Mr. Justice Story also cites, with approbation, *Thomas v. Harrow*, 4 Bibb, 563.

In that case "it appeared that the defendants, or those under whom they hold, had, more than twenty years before the suit brought, entered upon their respective tracts or parcels of land, and cleared and inclosed parts thereof, claiming title thereto under deeds of conveyance previously made to them according to specified boundaries; but although the person who made the conveyances claimed the land under an entry, it did not appear that the entry covered the land, nor did it appear that there had been any survey made or patent issued in virtue of the entry, until within less than twenty years prior to bringing the action."

In this case the question was, whether there was an adverse possession twenty years before bringing the suit. If there was an adverse possession at that time, it was by virtue of an entry upon a part of the premises under a deed with specific boundaries from a party having no title, or shadow of a title, to the particular land conveyed, and claiming the whole under the conveyance.

The court say: "On this state of the case, the question was made in the court below, whether the possession of the defendants should be co-extensive with the boundaries of their respective deeds or be confined to their close or fences? That court decided that their possession was co-extensive with the boundaries of their deeds, and so instructed the jury; and whether

that decision is correct or not is the only point presented by the record in this case.

"We have no hesitation in saying that the court below decided correctly. The case of *Fox v. Hinton*, 4 Bibb, 559, we apprehend is a decision on this point. It was held in that case that where there are two patents interfering with each other, while the possession remains vacant, an entry is made on the land within the interference, by one claiming title under the junior patent, his possession shall not be limited to his close, but be co-extensive with the interference; and in principle we can perceive no difference in this respect between the case of a possession acquired under a junior patent and a possession obtained under a deed with definite boundaries, which was made by one having no title. In either case the tract or parcel of land, the possession of which is intended to be taken, is equally certain; and the junior patent could not, no more than such a deed, confer a title. If even color of title was necessary, as was supposed in the argument on the part of the appellant, we could not doubt that the deed would be as efficacious as the patent for that purpose. But we cannot admit that the entry, being made under color of title, can have any effect in such a case; for to constitute an ouster, whether it be by abatement, intrusion, disseisin, or deforcement, the act must be tortious; and certainly it could not be less so if done without color of title than if it had been done under color of title."

In *Smith v. Frost*, 2 Dana, 149, the court say: "A person entering on land under a deed specifying the boundaries, is in possession to the extent of those boundaries, although the person making the conveyance to him had no title. The settler on land under a bond describing the metes and bounds acquires an actual possession to the extent of those bounds, whether the obligor had title or not, and the subsequent entry of an adversary patentee upon another part of the land gives no seisin to such patentee in the land so held by the settler": See also *Bank of Kentucky v. McWilliams*, 2 J. J. Marsh. 257.

In *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 286, the court, after citing *Higbee v. Rice*, 5 Mass. 344 [4 Am. Dec. 63], and *Jackson v. Elston*, 12 Johns. 454 (which see), say: "From these two cases, then, it appears that if a man enters upon a tract of land under a deed duly registered, though from one having no legal title to the land, and has a visible possession, occupancy, and improvement of only a part of it,

such occupancy and improvement, unless controlled by other facts, being continued thirty years is a disseisin of the true owner of the whole tract; and the reason is the nature and extent of his claim are or may be known by inspection of the public registry. His deed being registered there gives notoriety to his acts and his motives respecting the land he occupies."

In a note to this case, in the last edition of Greenleaf's reports, the editor says: "The principle here laid down has since continued to be the received and settled law in this state. The authorities seem to establish this rule that, if the entry and adverse possession is under a deed duly registered, and duly defining the boundaries of the tract therein mentioned, then such entry and adverse possession, if in other respects sufficient, will apply to the whole tract mentioned in the deed, although the person should be in the actual occupation of but a part of the tract, and although the deed was on its face void," and cites *Noyes v. Dyer*, 25 Me. 472; *Robison v. Swett*, 3 Id. 316; *Gookin v. Whittier*, 4 Id. 16; *Ross v. Gould*, 5 Id. 204; *Prescott v. Nevers*, 4 Mason, 326; *Green v. Liler*, 8 Cranch, 229; *Bailey v. Carlton*, 12 N. H. 9 [37 Am. Dec. 190]; *Crowell v. Bebee*, 10 Vt. 83 [33 Am. Dec. 172], and other cases. The cases already cited seem to us to go to the full extent necessary to decide the question of possession in favor of the plaintiff in the case under consideration, admitting the theory of the appellants to be correct, that color of title is necessary to extend the possession to the boundaries specified in the deed; and it is not necessary for the purpose of this decision to hold that a deed void upon its face would be sufficient to give color of title. The deed is from a party in open possession of a part, at least, claiming the whole where there is no adverse possession, and is valid on its face. This is sufficient under those authorities to constitute color. It is unnecessary to determine whether or not Shaddon would have had such color of title as would have given him possession of the entire tract had he been here as plaintiff claiming possession of the whole by virtue of the Heleno deed. It is sufficient for the plaintiff that he entered under the Shaddon deed, claiming the whole.

The appellants insist that the principles established by the cases cited apply only to adverse possession set up by parties in actual occupancy of lands, as a weapon of defense, and not to cases where a party out of possession relies upon a prior possession as evidence of title to recover upon against a party

in possession. We have already alluded to this point, but will recur to it again. Under the authorities cited, if Hicks should remain in possession in the manner he appears by the record to have occupied, for the period prescribed by the statute of limitations, he could undoubtedly maintain his possession against a party having the title in fee, in an action brought by such party to eject him. According to the authorities upon the subject, he would in fact, by such continued possession and claim, become vested with the title in fee. A possession which is sufficient, if continued for the prescribed period, to work such results as to the real owner of the land ought to be sufficient, in the mean time, to protect the possession against a mere intruder. If there is any difference in the two cases, upon principle, a less rigid rule as to what shall constitute a possession should be adopted as against a trespasser than as against the real owner of the land; and this view seems to be recognized by the authorities. In *Bailey v. Carlton*, 12 N. H. 17 [37 Am. Dec. 190], the court refers to this distinction, and says: "If the possession was not of a character to indicate ownership, and to give notice to the owners of an adverse claim, although the grantee might be held to be in possession according to his title, in a controversy with one who should make a subsequent entry without right, his possession ought not to be held adverse to the true owner, to the extent of his deed, merely by reason of the deed itself, even if recorded, nor by any entry under it. There are several cases which tend to sustain this view of the principle" (citing a number of cases). And again on same page: "If it may be said that color of title gives such constructive seisin and possession that the grantee could maintain trespass against any person who did not show a better right (that is, a title or prior possession), there is nothing in the nature of it which can give it a character of disseisin, or possession adverse to the true owner, so as to bind him." But it is enough for the purposes of this decision that possession, as to an intruder, should be put upon the same footing as an adverse possession, which would be sufficient, if continued, to toll the right of entry of the real owner.

The principles of the cases cited by us, as to what acts constitute possession, was also repeatedly recognized by the late supreme court, and in nearly every instance in actions to recover land where the plaintiff relied upon prior possession as evidence of title.

In *Gunn v. Bates*, 6 Cal. 265, the defendant asked the following instruction: "The mere fact that the plaintiff or the decedent was in actual possession, by inclosing a portion of the tract described in the Mexican grant, is no evidence of possession of any land not so inclosed or marked out with clearly defined boundaries."

The court refused it, and gave the following: "If you believe from the evidence that Sheldon entered upon and took possession of the tract of land described in his grant under and by virtue of that grant; that he was put in possession in the manner described by the first witness (General Sutter); and that he immediately went on to occupy and improve, and continued to occupy and improve a part of the land, and asserted his claim and possession to the whole under his grant, and no other person was in adverse possession of any portion of the land; and that Sheldon, or his representatives, never abandoned the land; and that the premises in controversy in this suit are within the boundaries described in the grant,—you will find for the plaintiff." Defendants excepted, and these rulings were reviewed and sustained by the supreme court. Mr. Chief Justice Murray cited the rule already quoted from *Ellicott v. Pearl*, 10 Pet. 442, and said: "This doctrine has never, within our knowledge, been doubted in this court": *Gunn v. Bates*, 6 Cal. 272. The case turned upon this point, as the other views presented by the chief justice were not concurred in by the other members of the court.

In *Rose v. Davis*, 11 Cal. 141, Mr. Justice Baldwin said: "The court, at the instance of plaintiff, gave several instructions, numbered from one to five in the record, which seem to us to be correct." The first instruction referred to embodied the same principle as that given in *Gunn v. Bates*, 6 Id. 265. But the case is perhaps not entitled to much weight, for the reason that a decree of confirmation seems, from another instruction, to have been read in evidence: See also *Baldwin v. Simpson*, 12 Id. 560; *Keane v. Cannovan*, 21 Id. 299 [82 Am. Dec. 738]. In the last case, the deed from Ramirez to Mondolet was held admissible, "as showing the extent and boundaries of the premises of which Mondolet claimed possession."

But admitting the rule to be, that the entry upon and occupation of a part of a tract of land, under a deed claiming the whole, gives constructive possession to the entire tract within the calls of the deed, it is still insisted by the appellant that this principle does not apply to large tracts of land like that

in controversy, but that it must be limited to tracts of the customary size, such as are usually occupied as farms partly cultivated; and some New York cases are cited which sustain this view. It would be found very difficult to apply the principle with such a limitation. Who shall say what tract of land is of the customary size, particularly in a new and sparsely settled country, where possessions are measured by leagues rather than acres, or even miles? Prior to 1850 the customary size of tracts of land held and occupied for grazing purposes—the chief occupation of the old inhabitants of California—was much larger than the tract in question. But admitting the limitation of the rule contended for to exist, the tract in dispute would doubtless, at the date of Shaddon's deed, be within the rule thus limited. The tract in *Ellicott v. Pearl*, 10 Pet. 442, was seven thousand acres, much larger than the tract in question. In *Gunn v. Bates*, 6 Cal. 265, already cited, the defendant asked the following instruction: "Possession of a portion of a large tract, under a conveyance of such larger tract, will not extend to the full extent of such larger tract when the same amounts to several Mexican square leagues. Such constructive possession is limited to tracts of land usually occupied and used for farming purposes, in the usual course of husbandry in the country. If you believe, from the evidence, that Sheldon never had the boundaries of the tract described in the grant marked out, and that the same exceeds the usual limits of a farm, then his possession is limited to the land he had actually inclosed or clearly marked out; and in such a case, if the tract in the possession of the defendants is not included within any such inclosure or marked boundaries, you will find for the defendants."

This instruction was refused, and the refusal assigned as error. Mr. Chief Justice Murray's comments upon the instruction refused are equally applicable to the case under consideration. He said: "The court properly refused the instruction asked by the defendants. The law does not require that the whole tract should be inclosed; it is sufficient if the grant, under which the plaintiff entered, calls for distinct boundaries; neither should the plaintiff's recovery be limited to the size of a usual farm; there is no principle we know of which should alter the rule we have laid down; besides, at the time of the execution of this grant, the land was designed for grazing, and not for agricultural purposes, and the grant was less than the usual size of concessions for such purposes."

There was no error in refusing to admit in evidence the certified copies of papers from the transcript in the case of *United States v. J. A. Sutter for the Mokelumne Indians*. The papers could not have aided the defendants had they been admitted.

The defendant Coleman introduced deeds from some twenty-seven Mokelumne Indians, executed in 1856, to one Powers, purporting to convey to said Powers three leagues of land, including the lands in controversy. It is insisted that plaintiff and defendant Coleman derive such title as they have from the same source, and that they are therefore tenants in common.

We have already seen that there is no evidence in the case to show that plaintiff derives, or claims to derive, any title from the so-called Micheltorena grant to the Mokelumne Indians, and this disposes of the whole basis of the long argument on this point.

It is admitted and insisted by the appellants that the Mokelumne Indians had no title or if they had, that Indians have no capacity to convey; and for these reasons Heleno, not only could not convey the title of his tribe, but that he could not even convey his own interest. In both these positions we think they are right, and the same objections apply with equal force to Coleman's conveyances from the twenty-seven Indians. If the Indians had any interest at all, it was of a public nature, for the benefit of the Indian community at large. It was not subject to sale to individual purchasers by any one or more, or even all of the members of the tribe. Such sales are contrary to the policy and laws, both of the governments of Mexico and the United States. To insist that any right, as tenants in common or otherwise, could be acquired under a conveyance from any number of a recognized tribe of Indians sustaining the ordinary relation of individual Indians to their tribe, would be very much like claiming that any one or more citizens of California might convey their individual, undivided interest in the swamp and overflowed lands, or any other lands donated by the United States to the state of California for public purposes, and that the grantee would thereby acquire such a right of property therein as would constitute him a tenant in common with all other citizens of California, and enable him to defeat an action for their recovery, with this difference, however, in favor of the latter proposition,—that a citizen of California can convey lands in which he has an interest as owner, while an Indian, sustain-

ing the relation to his tribe above referred to, has no capacity recognized by law to convey lands. Such a claim would be preposterous in the extreme.

Yet it is insisted that Coleman, by virtue of his conveyances from the twenty-seven Mokelumne Indians, is in under color of title,—that plaintiff at best only entered under color of title, and that a colorable title in Coleman is sufficient to enable him to defeat a merely colorable title in plaintiff. But admitting that plaintiff only entered under color of title, and that defendant also had color, still plaintiff derived his possession and color from an entry under a deed from Shaddon, valid on its face, at a time when he was in possession of a part, claiming the whole, and when there was no adverse possession. His possession, under these circumstances, being also prior in point of time, was therefore best, for prior possession is evidence of title in fee. In the apt and accurate language of Mr. Justice Heydenfeldt, in *Norris v. Russell*, 5 Cal. 250, "it is objected that the defendant had color of title, although his possession was subsequent to plaintiff, and therefore it is urged his possession ought to prevail. But it must be held in view that prior possession is evidence of title, and cannot by any system of reasoning be made to yield to mere color of title, or in other words to that which is not title."

Also in *Keane v. Cannovan*, 21 Cal. 305 [82 Am. Dec. 788], Mr. Chief Justice Field used language equally applicable. He said: "The possession of Mondolet was evidence of seisin in fee in him, and no further or higher evidence of title was required to enable the plaintiff claiming through him to recover, until the defendant had shown an anterior possession, or had traced title to a paramount source. It is immaterial, in this view, whether we consider the tax deed to Dumartheray sufficient to constitute color of title, or otherwise."

So it is immaterial whether we consider the deeds from the Mokelumne Indians, put in evidence by Coleman, sufficient to constitute color of title, or otherwise. We are unable to perceive that these deeds, or the certified copies of papers from the surveyor-general's office offered in evidence by defendant Coleman and rejected, are entitled to cut any figure in the case.

The next principal error relied on by appellants is, that in admitting in evidence the Cleal survey and rejecting the Brewster survey the court adopted an erroneous theory in locating the land described in the Shaddon deed. The con-

struction of the description, in the conveyance from Shaddon to Hicks, was a question to be determined by the court. Neither theory adopted by the respective surveyors was, in all respects, correct. But the Cleal survey was based upon the correct theory in every particular, except the line opposite the river. The deed calls for one league, and the first boundary is to be the Cosumnes River. It is well settled by numerous authorities that where a river is named as a boundary, the boundary line follows the meanderings of the stream. It is also established by the authorities that when a line is to run up or down a stream not navigable a given distance, the meanderings of the stream are to be followed until the required distance, when reduced to a straight line, is attained,—and where courses are not specified, the other lines are to be run in such a manner that the land shall be in a form as nearly rectangular as possible. Thus in *Craig v. Hawkins*, 1 Bibb, 54, a thousand acres of land was to be laid off, commencing at a point on a “branch of the Jessamine, running down the same one mile, extending northwardly for quantity.” The court say: “The beginning being admitted, it will only be necessary to construe the expressions ‘running down the stream’”; and it was held that these expressions “clearly import that the branch was intended to be one boundary of the claim, and that it was to form the base of the survey.” And the court say that the land should be surveyed by beginning at the designated point, “and running thence down the branch, with the meanders thereof, one mile, when reduced to a straight line; and from the beginning and the termination of said line of one mile, extending lines off from the branch northwardly at right angles, to the general course of so much of the branch as will be embraced by the survey, so far that a line drawn at right angles to those two last-mentioned lines, and parallel to the general course of the part of the branch so embraced as aforesaid, will include the quantity of one thousand acres”: See also *Calk v. Stribling*, 1 Bibb, 123; and there are many other authorities to the same effect, which, it would seem, need not be cited to sustain a construction in itself so reasonable.

The first line, then, is to commence at the point of the river called Paso Viejo, and is to follow the meanders of the river until a point in the river is reached one league distant, when reduced to a straight line, from the point of beginning, and the straight line between these two points will form the proper basis for laying off the other lines. The second line starts

from the point in the river called Paso Viejo, and runs in a line directly crossing the line of the river. It is plain to us that this line should run at right angles with the line last referred to, being the line of the general course of the river within the survey. The fourth line is to run "one league, or five thousand varas," parallel with the last-mentioned line; and the third line is to run one league, or five thousand varas, parallel with the Cosumnes River. We think the plain construction of the call for the third line is, that it is to run parallel with the river in all its meanderings, and not parallel with its general course. This is the obvious import of the terms "parallel with the Cosumnes River." No other line can be said to be parallel with the river.

In the cases where the line opposite the river has been run as a straight line, there is no specific description of that boundary. The description generally gives the starting point and the river as the first boundary, then says, running in some designated direction for quantity; and it is held in such cases that a straight line is to be run corresponding with the general course of the river within the survey the designated distance, if given; if not given, far enough to constitute one side of a square containing the given quantity; that the side lines are to be drawn at right angles from the extremities, and then the fourth line to be drawn at a sufficient distance from the river to include the required quantity between it and the river. But in the case under consideration the direction of the line opposite the river is given in express terms: See *Keith v. Reynolds*, 3 Me. 393; *Williams v. Jackson*, 5 Johns. 506; *Van Gorden v. Jackson*, 5 Id. 441.

The construction we have given to the calls of the deed will give the exact quantity called for,—one league. While the theory upon which the Brewster survey is made would give less than a league, the construction which makes the third line a straight line, parallel with the general course of the river, would in this instance give more than a league. Had the meanders of the river been different, the quantity might have been much more or much less than a league, depending upon the extent and direction of its sinuosities. The construction we have put upon the calls of the deed is the only one that harmonizes the quantity called for with the extent and direction of the lines, and in our judgment is the only reasonable construction the language will bear. The distance on the third line is made to harmonize with its meanderings, upon

the same principles that the distance is measured on the river boundary, which is parallel with it.

The plat of the Cleal survey in evidence is constructed on the principles we have indicated, with the exception of the third line. The third line is parallel with the general course of the river, instead of its meanderings, as it ought to be. In this respect it is erroneous. The judgment follows the Cleal survey, and is also erroneous in the same particular, but correct in all other respects. It therefore becomes necessary to inquire whether this error is fatal to the judgment, or whether it can be so modified as to do justice between the parties.

It is not pretended by appellants that Coleman's land and a portion of Castle's is not within the calls of the Shaddon deed to Hicks, even upon the theory of the Brewster survey, which is by far the most favorable one for the appellants that has been advanced. It is only contended that less of Castle's land would be embraced in the Brewster survey than in any other, and that Randolph's would be entirely excluded. The testimony shows that some twenty or thirty acres only of Randolph's land lay within the Cleal survey in the southwest corner, and the jury necessarily found that a part at least was within this survey. At that point, the line parallel with the meanderings of the river, which we have adopted as the true line, comes down as far as and a little below the straight line of the Cleal survey, and therefore necessarily includes the same land in the possession of Randolph, or at least a part of it, that is included in the Cleal survey. To entitle the plaintiff to a judgment, it is enough that each of the defendants is in possession of any portion of the land belonging to plaintiff; and as no damages were awarded, the extent of the land in the wrongful possession of the defendants, so far as it affects the right of plaintiff to a judgment, is not a matter of any consequence to them, provided they are not ejected from any lands of which they are rightfully possessed.

There is no doubt, then, that the plaintiff is entitled to recover as to all the defendants against whom judgment is entered; but the difficulty is, the record is not in such a condition that we can make the required modification of the judgment. The complaint, instead of following the description contained in Shaddon's deed to Hicks, adopts a description as to the third line corresponding with the theory of the Cleal survey; the verdict is general, giving no specific boundaries of the tracts in possession of the several defendants,

and must be held to extend to the boundaries stated in the complaint and of the Cleal survey; the judgment follows the description in the complaint. The complaint, the evidence as admitted, the verdict, and the judgment, are in entire harmony, and we cannot modify the judgment without setting aside the verdict, and finding another upon the evidence in harmony with the construction of the Shaddon deed adopted by us. This we are not authorized to do, and for this reason the judgment must be reversed, and a new trial ordered: *Clark v. Huber*, 20 Cal. 198. Had the complaint and judgment followed the description of the deed to Hicks, the judgment might have been affirmed. But it does not, and as more land in the possession of defendants is included in the judgment than plaintiff is entitled to recover, a new trial is rendered necessary.

There is no error in the instructions relating to the declarations of Hicks. Those declarations, under the circumstances shown by the record, were clearly insufficient to constitute an estoppel as to defendants Castle and Randolph, and the court might safely have directed the jury to disregard them altogether.

No exception was taken at the time to a joint verdict, admitting it to be joint, or to the judgment being entered jointly. True, at the commencement of the trial separate verdicts were demanded. But at the close of the case, neither the attention of the court nor the jury appears to have been called to the matter. Had the counsel called attention to it at the time the case was submitted, doubtless the court would have given the proper directions, or have had the verdict corrected, in this respect, on the coming in of the jury. At least, there would have been an opportunity given for such action. It not having been done, the objection cannot be taken for the first time in this court. Besides, no damages were awarded, and the defendants are in no way injured by the error, if it be such.

There is no error in the charge of the judge. If there is any error in those parts to which exception has been taken in the arguments, it consists in being more favorable to the defendants than the evidence, and the law applicable to it, justified. The exceptions to the charge are too general in their terms. We take this occasion to remark that exceptions to a charge ought to point out the specific portions excepted to, and to be made at the time of the trial, in order that the judge

may have an opportunity, before the jury retires, to correct any error he may have inadvertently fallen into, in drawing up the charge in the hurry and perplexities of the trial.

The other points not particularly referred to in this opinion do not require comment.

As the same questions will arise upon another trial, we have thought proper to discuss all the important questions in the case.

Judgment reversed, and a new trial ordered.

CURREY, J., having been of counsel, did not sit upon the hearing of this case.

RHODES, J., expressed no opinion.

SUFFICIENCY OF DESCRIPTION IN DEED BY REFERENCE TO OTHER INSTRUMENTS: *Newman v. Tymeson*, 80 Am. Dec. 735, and cases cited in note to same 738.

OCCUPANCY OF PART AS POSSESSION OF WHOLE TRACT OF LAND: *Denham v. Holean*, 71 Am. Dec. 198; collected cases in note to *Williams v. Ballance*, 74 Id. 189; note to *Royall v. Lessee of Lisle*, 60 Id. 716; note to *Casey's Lessee v. Inloe*, 39 Id. 687; *McLaurin v. Salmon*, 52 Id. 563.

INVALID DEED MAY BE EVIDENCE OF EXTENT OF CLAIM of the party in possession under it, though admissible for no other purpose: *McLaurin v. Salmon*, 52 Am. Dec. 563.

POSSESSION AS EVIDENCE OF TITLE: See extended note to *Plume v. Seward*, 60 Am. Dec. 601-604; *Keane v. Cannovan*, 82 Id. 738; and that prior possession is evidence of title, see *Bird v. Liebros*, 70 Id. 617, and note 620.

POSSESSION, ADVERSE OR OTHERWISE, WHEN EXTENDS TO BOUNDARIES IN DEED: See note to *Keane v. Cannovan*, 82 Am. Dec. 746; *Royall v. Lessee of Lisle*, 60 Id. 712.

COLOR OF TITLE, WHAT CONSTITUTES: See note to *Wafford v. McKinna*, 76 Am. Dec. 57; *Edgerton v. Bird*, 70 Id. 473, and note 478; *City of St. Louis v. Gorman*, 77 Id. 586; note to *Beverly v. Burke*, 54 Id. 357; *Green v. Kellum*, 62 Id. 332.

CERTIFIED COPY OF DEED AS EVIDENCE: *Beverly v. Burke*, 54 Am. Dec. 351; *Seechrist v. Baskin*, 42 Id. 251; note to *Coons v. Renick*, 60 Id. 234.

ADVERSE POSSESSION FOR PERIOD PRESCRIBED BY STATUTE OF LIMITATIONS WILL CONFER TITLE TO LAND: See collected cases in note to *Williams v. Ballance*, 74 Am. Dec. 189.

CONVEYANCE OF LAND BY INDIANS, VALIDITY OF: See *Breaux v. Johns*, 50 Am. Dec. 555, and note 559, showing that their possession is possessory merely, and cannot be used to defeat a grant made to them.

BOUNDARY FOLLOWS MEANDERINGS OF STREAM, WHEN AND WHEN NOT: See *Pike v. Monroe*, 58 Am. Dec. 751, and collected cases in note thereto 756; *Sudd v. Brooke*, 43 Id. 321. In the first case, "down river" is defined; in the second, the words "running up a creek" are defined. Courses and distances along a stream returned as the line of a grant or survey are to be disregarded so far as they do not agree with the line of the stream: *Ball v. Slack*, 30 Id. 278.

EXCEPTIONS MUST POINT OUT SPECIFIC PORTIONS OF CHARGE EXCEPTED TO: *Coons v. Renick*, 60 Am. Dec. 230; *Karakadden v. Poorman*, 36 Id. 145; and be made before the jury leave the bar: *City Council of Montgomery v. Gilmer*, 70 Id. 562.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: A person who enters into the actual possession of a portion of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, is not limited in his possession to his actual inclosure, but acquires possession to all of the land not in the adverse possession of another person at the time of his entry: *Ayres v. Bensley*, 32 Cal. 631, 632; *Walah v. Hill*, 38 Id. 487; *Davis v. Perley*, 30 Id. 639; *Judson v. Malloy*, 40 Id. 308; *Donahue v. Gallavan*, 43 Id. 575; *Russell v. Harris*, 44 Id. 493; S. C., 38 Id. 428; *Hoag v. Pierce*, 28 Id. 191. These cases show that the possession extends to the bounds of the entire tract described in the deed. But this doctrine as thus broadly stated was modified in *Cannon v. Union Lumber Co.*, 38 Id. 676, and *Wolfskill v. Malajowich*, 39 Id. 230, where it was held that an entry on a part of a tract of land, under a deed which the grantee knows does not convey the whole, does not extend constructive possession to the whole. If the deed contains no definite and certain boundaries, which can be located, marked out, and made known, it cannot have the effect to extend the possession beyond the *possessio pedis*, which is definite, positive, and notorious: *Hess v. Winder*, 30 Id. 359. Lines "parallel with river" mean those parallel with the river in all its meanderings, and not parallel with its general course: *Pratt v. Woodward*, 32 Id. 226. A nonsuit should not be granted if there is evidence tending to prove all the material allegations of the complaint; the evidence should be submitted to the jury: *McKee v. Greene*, 31 Id. 420. The course of a line beginning at a street and running therefrom is presumed to be at a right angle with such street where the course is not otherwise laid down: *Austrian v. Davidson*, 21 Minn. 120. Where a contract refers to another contract as containing the plan by which, and the prices for which, work sued for is to be done, the contract referred to is admissible in evidence for purposes of description, whether it is valid or not, and without its execution being proved: *Newell v. Cowell*, 36 Id. 650. Certified copies of recorded instruments may be read in evidence without proof of the originals, where the original is not under the control of the party offering such copy: *Mayo v. Mawesen*, 38 Id. 449; *Landers v. Bolton*, 26 Id. 413. Exceptions to charge of court must be made to a specified portion thereof, and before the case is finally submitted to the jury, or they will be unheeded by an appellate court: *Griswold v. Boley*, 1 Mont. 554; *Rogers v. Mahoney*, 62 Cal. 612; *Brown v. Kenisfeld*, 50 Id. 132; *Robinson v. Western P. R. R. Co.*, 48 Id. 425; S. C., 7 Am. R'y Rep. 251; *Sill v. Reese*, 47 Id. 348.

IRWIN v. BACKUS.

[25 CALIFORNIA, 214.]

SURETIES UPON OFFICIAL BONDS, AS GENERAL RULE, ARE NOT CONCLUDED by decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense; but administration bonds form an exception to this general rule.

PROBATE PROCEEDINGS ARE ADMISSIBLE IN EVIDENCE AGAINST SURETIES ON ADMINISTRATOR'S BOND, WHEN. — Probate proceedings in passing on an

administrator's account, and a decree therein rendered directing the administrator to pay over a sum found remaining in his hands, are, in an action against the sureties on the administrator's bond for a breach of the bond by the principal, admissible in evidence against the sureties, although the sureties were not made parties to such probate proceedings.

DECREE OF PROBATE COURT DIRECTING ADMINISTRATOR TO PAY OVER SUM FOUND DUE IS CONCLUSIVE upon the administrator and his sureties. Upon the refusal of the administrator to obey the same, the liability of the sureties attaches, and they cannot go behind the decree to inquire into the merits.

SURETIES MAY SHOW IN DEFENSE WHEN SUED UPON ADMINISTRATOR'S BOND for a breach thereof by the principal in not paying over a sum found due by the probate court and decreed by such court to be paid, that the bond was not made, or that such decree was not made, or that if made the same has been obeyed, or that it was obtained by fraud or collusion; but they cannot show that the court has erred in making the decree, or that no assets ever came into the possession of the administrator, although the court has so found and adjudged.

CONFLICTING CASES SUMMARIZED AS TO ADMISSIBILITY OF PROBATE PROCEEDINGS in an action upon an administrator's bond against his sureties, for a breach of the bond by the principal, as to its effect when admitted.

BACKUS, the principal in the bond, was not served with process. The sureties appealed. Other facts are stated in the opinion.

J. W. Winans, for the appellants.

Harrison and Estee, for the respondent.

By Court, SANDERSON, C. J. This is an action upon the official bond of the defendant Backus, as public administrator of the city and county of Sacramento, against him as principal, and his co-defendants as sureties. The suit is brought by his successor in office to recover the amount of a certain estate, which came into the hands of Backus in the course of official business, and which he refused to pay over to his successor, the plaintiff, pursuant to the order and decree of the probate court. The plaintiff had judgment in the court below, and the defendant, having moved for a new trial, which was denied, appeals. The facts, as disclosed by the record, are substantially as follows:—

In 1857, Backus obtained letters of administration upon the estate of one J. T. M. Cooper, and took charge of the same through one J. C. Barr, who for a long time previous and subsequent thereto acted as the clerk or agent or attorney in fact of Backus, in connection with the business of his office of public administrator. The business in the probate court seems to have been transacted by Backus, and the collection of the as-

sets belonging to the estate seems to have been made by Barr. After keeping the estate in his hands, without rendering an account, until May, 1859, Backus, upon petition of the heirs, was cited by the probate court to render his account pursuant to law. In reply to the citation, Backus alleged that the deceased was not a resident or inhabitant of the county at the time of his death, but that he was a resident of — county (name not stated), and denied the jurisdiction of the court, charging that the letters of administration which had been issued to him were therefore null and void. At the same time he filed his final account, and a day was appointed for the hearing, of which due notice was given according to law. Upon the issues thus formed, a trial was had in the probate court, resulting in the following finding of facts and decree: "Some time in the spring of 1857, J. T. M. Cooper departed this life in the city and county of Sacramento, where he resided prior to and at the time of his death. It does not appear that he ever had any residence in the state of California elsewhere than in Sacramento County. After the death of said Cooper, to wit, on the twenty-first day of April, 1857, Gordon Backus, then public administrator of Sacramento County, petitioned to be appointed administrator of said estate, and on the said twenty-first day of April, 1857, the probate court of said county of Sacramento made an order appointing said Gordon Backus administrator of said estate as aforesaid of said J. T. M. Cooper, and that he take charge of and administer upon the same according to law. That said probate court also appointed John C. Barr, L. Farmer, and M. McIntyre appraisers of said estate, who went on and appraised the same, and found the said estate to consist of the following items, to wit: Cash, \$152.38; W. H. Bullard's certificate of deposit, \$550; W. L. Pritchard's note, \$650; T. A. Goodell's note, \$200; A. P. Carter's note, \$280, making a total sum of \$1,832.38. The whole of which estate, according to the items aforesaid, was paid over by Morrison McIntyre to John C. Barr, who received the same as the agent or clerk of the said Gordon Backus, and who was authorized by the said Backus to receive the same by his authority. Afterwards, said Barr collected all the notes outstanding, save the note on A. P. Carter. That said Barr, acting as the agent or clerk of Backus, collected in cash the sum of \$1,560; that out of this some small bills were paid, such as funeral expenses, affidavits of appraisers, etc. That said Barr paid over to said Backus, in cash, the sum of \$1,338, in addition to the

sum of \$202.38, which Barr collected, which he informed the said Backus was subject to his order. But the said Barr asked the said Backus to use the said amount of \$202.38 on account of what Backus was owing him, which Backus allowed him to do. That Backus never filed any appraisal of said estate; never gave any notice to creditors as required by law, or rendered any exhibit whatsoever of the condition of said estate."

Upon the foregoing facts, the court decreed that Backus should be removed from the office of administrator of the estate in question, and that he should pay over to his successor the sum of \$1,540.38, and deliver to him the Carter note for \$280. The plaintiff was appointed such successor, and Backus was ordered to pay over to him as aforesaid. The plaintiff demanded the estate from Backus, who refused to pay over the same.

On the trial, in connection with other evidence of like tendency, the foregoing proceedings in the probate court were offered in evidence by the plaintiff for the purpose of proving a *devastavit* against Backus, and fixing the amount of their liability against his sureties. The evidence was objected to upon the ground that the sureties were not parties to the proceedings, and therefore unaffected thereby, and that as against them the *devastavit* and the amount thereof must be established by other evidence. The court admitted the evidence, but before the case was finally submitted to the jury, the opinion of the court seems to have changed, for the jury were instructed in effect to disregard the evidence, and base their verdict entirely upon the other evidence in the case. With the proceedings of the probate court discarded, appellant claims that the other evidence in the case fails to sustain the verdict, and that some portion of it was improperly admitted. All the points made by appellant are founded upon the theory that the proceedings in the probate court were inadmissible for any purpose as against the sureties, and hence become immaterial if that theory proves fallacious. As we are of the opinion that the proceedings were admissible, we shall therefore confine ourselves to the consideration of that question. If the proceedings were admissible, there being no pretense of fraud or collusion, another trial would result in a like verdict, and hence, if error was committed in admitting other evidence bearing upon the same point, such error (in the absence of any conflict of testimony, which is the case here), becomes inconsequential.

There is some conflict of authority as to the admissibility of this kind of evidence in an action upon an administrator's bond against his sureties for a breach of the bond by the principal, and as to its effect when admitted. The supreme court of North Carolina decided that a recovery against a guardian was no evidence against his sureties in an action upon his bond for non-payment of the judgment: *McKellar v. Bowell*, 4 Hawks, 37. The same court held that a judgment obtained by a creditor of an intestate against his administrator could not be used as evidence by the creditor in an action against the sureties upon the administrator's bond: *McBride v. Clark*, 2 Id. 43. In several of the other states a contrary doctrine has prevailed. The supreme court of Massachusetts has decided that in an action upon an administrator's bond against the administrator and his sureties, for a refusal on his part to pay a judgment recovered against him, such judgment if not obtained by fraud and collusion is conclusive upon the sureties in regard to all matters of defense affecting the merits of the claim as between the parties to such judgment: *Heard v. Lodge*, 20 Pick. 53 [32 Am. Dec. 197]. In New York it has been held that whatever binds and concludes the administrator equally binds and concludes his sureties: *Baggott v. Boulger*, 2 Duer, 160; *People ex rel. Demarest v. Laws*, 3 Abb. Pr. 450. So in Pennsylvania it has been held that a decree of the orphans' court against an administrator is conclusive upon his sureties: *Garber v. Commonwealth*, 7 Pa. St. 265. In Indiana an administrator was convicted by the finding and decree of the probate court of having committed waste. His settlement was opened up and the court found that he had in his hands, unaccounted for, the sum of \$1,732 belonging to the decedent's estate. This finding was held to be conclusive upon his sureties, both as to the waste and the amount thereof: *Salzer v. State*, 5 Ind. 202. The same doctrine prevails in Kentucky, Missouri, and South Carolina: *Hobbs v. Middleton*, 1 J. J. Marsh. 177; *State v. Holt*, 27 Mo. 340; *Lyles v. Caldwell*, 3 McCord, 225. In South Carolina it seems to be doubted whether the decree of the ordinary is conclusive of anything more than the fact that the administrator has been legally cited to account, and of the different items composing his account, so as to relieve a court of law from an investigation into their merits: *Simpkins v. Cobb*, 2 Bail. 60.

As a general rule, sureties upon official bonds are not concluded by a decree or judgment against their principal, unless

they have had their day in court, or an opportunity to be heard in their defense; but administration bonds seem to form an exception to this general rule, and the sureties thereon, in respect to their liability for the default of the principal, seem to be classed with such sureties as covenant that their principal shall do a particular act. To this class belong sureties upon bail and appeal bonds, whose liability is fixed by the judgment against their principal. This distinction seems to be founded upon the terms of the obligation into which the sureties upon an administration bond enter, which are, that their principal shall faithfully perform all the duties imposed upon him by the nature of his trust, and will account for and pay over all money which may come into his hands pursuant to the orders and decrees of the probate court. The account must be rendered to and settled by the court, and the money must be paid out and distributed by and pursuant to the orders and decrees of the court; and the undertaking of the sureties is, that their principal will do all this. "The ordinary agrees to place in the hands of the administrator the goods, chattels, etc., of the deceased person, to be by him well and faithfully administered, and the administrator and his sureties undertake that the administrator shall make a just and true account, etc., whenever required by the ordinary, and pay over, etc. Now, the administrator is the person who is cognizant of all the affairs of the estate. The surety is not supposed to know anything about the accounts. The surety is not required to go before the ordinary. He knows that he cannot be made liable until his principal has been called to account, to pay over, and a decree to that effect has been made by the ordinary. His contract, then, is made with reference to all this": *Lyles v. Caldwell*, 3 McCord, 225.

The condition of the bond in the present case is to the effect "that the said Backus shall faithfully perform all the duties enjoined upon him by law as such public administrator, and particularly that he will account for and pay over all moneys and property that may come to his hands as such administrator." This means that he will account to the probate court, and will pay over, to such persons as such court may direct, all moneys and property of which he may become possessed in his official capacity; or in other words he will obey the orders and decrees of such court. Such are the terms of the contract; and upon the refusal of the administrator to obey such order or decree, the liability of the sureties attaches, and

they are bound to make good the default of their principal, and cannot go behind the decree to inquire into the merits. They may show in defense, either that the bond was not made, or that the decree was not made; or if made, that the same has been obeyed; or that the same was obtained by fraud or collusion; but they cannot show that the court has erred in making the decree, or that no assets ever came into the possession of the administrator, although the court has so found and adjudged. If any error has been committed, a remedy is afforded by appeal. Until the order or decree is reversed, it is equally conclusive upon the administrator and his sureties: *People ex rel. Demarest v. Laws*, 3 Abb. Pr. 450. We think the proceedings of the probate court were admissible, and in the absence of any fraud or collusion were conclusive upon the sureties, both as to the *devastavit* and the amount thereof.

It follows from what has been said that the verdict of the jury was right, although errors may have been committed by the court; and there being no pretense that the decree was the result of fraud or collusion, a new trial would not result in any advantage to the appellants.

Judgment affirmed.

SURETIES UPON OFFICIAL BONDS ARE NOT BOUND BY JUDGMENT against their principal in an action to which they were not parties: *Pico v. Webster*, 73 Am. Dec. 647; or had no notice: *Thomas v. Hubbell*, 69 Id. 619, and cases cited in note 622. As to when sureties on an official bond are proper parties, see *Governor v. White*, 24 Id. 763.

DECREE OF PROBATE COURT REQUIRING EXECUTOR OR ADMINISTRATOR TO PAY OVER MONEY IS CONCLUSIVE against his sureties: *State v. Holt*, 72 Am. Dec. 273, and note 276, citing the principal case.

EXTENT OF SURETIES' LIABILITY ON BONDS OF ADMINISTRATOR OR EXECUTOR: See extended note to *Commonwealth v. Stub*, 51 Am. Dec. 519-534.

RECORDS OF PROBATE COURT ARE EVIDENCE of matters to which they relate: *Remick v. Butterfield*, 64 Am. Dec. 316; and the judgments, orders, etc., of such court, when within their jurisdiction, are conclusive until reversed or vacated: See collected cases in note to *Saltonstall v. Riley*, 65 Id. 241.

THE PRINCIPAL CASE WAS CITED in *Fox v. Minor*, 32 Cal. 120, to the point that the judgment of a probate court against a guardian is conclusive upon his sureties. Sanderson, J., in his dissenting opinion commented upon and quoted at length from the principal case. He agreed, however, with his associates in adhering to the rule in the principal case, but differed from them as to the consequences following it: See pp. 121-128, 130. The two cases were considered identical in principle, as administrators and guardians are alike officers of the probate court; and in legal effect, their bonds are the same, and their sureties, in all legal respects, stand upon the same level: See p. 122. The principal case was also cited in the following authori-

ties, and to the point stated: The decisions concerning the binding force of a decree of settlement made by a probate court upon the sureties of an administrator turn mainly on the terms and construction of the condition of the bond; and the bond required by the statute of Nevada differs from that of most other states where such sureties are held bound: *McNabb v. Watson*, 7 Nev. 173. Judgment upon appeal bond is conclusive against sureties as to all points upon which it operates: *Hathaway v. Davis*, 33 Cal. 170; *Murdock v. Brooks*, 38 Id. 601.

PORTER v. ELAM.

[25 CALIFORNIA, 291.]

COMPLAINT UPON PROMISSORY NOTE, COLLECTION OF WHICH IS BARRED BY STATUTE OF LIMITATIONS, CONTAINS CAUSE OF ACTION, where it alleges that the defendant has, within four years prior to the commencement of suit, "in writing, acknowledged and promised to pay the note."

WHILE THERE CAN BE NO WRITTEN PROMISE OR ACKNOWLEDGMENT WITHOUT SIGNATURE, an allegation that defendant, "in writing," acknowledged and promised to pay his note, imports that the defendant signed his name to the writing.

THE facts are stated in the opinion.

John Reynolds, for the appellant.

N. Bennett, for the respondent.

By Court, SHAFTER, J. The complaint in this case contains three counts, framed upon three several promissory notes, executed by the defendant to one Gray, and by him indorsed to the plaintiff.

The defendant demurred to the first count, on the ground that it appeared that the note described therein was barred by the statute of limitations. The demurrer was overruled.

The defendant answered the last two counts, and, on motion, the answer was stricken out by the court, on the ground that the complaint was sworn to and the answer was not.

Judgment was entered for the plaintiff on all the counts, and the defendant appeals.

1. As to the demurrer: The note described in the first count fell due on the 19th of November, 1858, and the complaint was filed on the 19th of March, 1863. The count contains the following averment: "The said defendant has, since the fourth day of October, 1859, in writing acknowledged and promised to pay the same [the note], but has wholly neglected so to do." It is insisted for the appellant that the averment does not amount to an avoidance of the statute, for the reason

that it is not stated in terms that the written promise alleged "was signed by the defendant."

No case is cited in support of the objection, except *Peña v. Vance*, 21 Cal. 142; but that case merely decides that there can be no written promise or acknowledgment without a signature. All that may be admitted, but it would have no effect to determine the question of pleading raised by the demurrer in favor of the appellant. We accept the view of the defendant's counsel as correct, that all the facts essential to the avoidance should be stated; and there can be no doubt, under the decision, that the signature of the party to the written promise or acknowledgment is essential. But we consider the allegation that the "defendant has in writing acknowledged and promised to pay," etc., involves the very fact which counsel assumes to have been omitted. A man may promise verbally to fulfill certain stipulations previously noted in a written memorandum, but he cannot "promise in writing" without affixing his signature to the written promise; and the case of *Peña v. Vance*, 21 Cal. 142, cited for the appellant, favors the correctness of this conclusion.

2. It is further insisted that the court erred in striking out the defendant's answer to the last two counts; and the reason assigned is, that the complaint was not sworn to in legal effect.

We have examined the affidavit, and find it to be in strict conformity to the requirements of the practice act.

The judgment is affirmed; and it appearing to the court that the appeal must have been taken for delay, on claim by respondent, ten per cent of the judgment below is added to the costs, by way of damages.

CURREY, J., having been of counsel, did not sit on the hearing of this case.

MACLAY v. LOVE ET UX.

[25 CALIFORNIA, 267.]

IN CALIFORNIA, NO TITLE TO SEPARATE PROPERTY OF WIFE, EITHER REAL OR PERSONAL, CAN BE CONVEYED, except by an instrument in writing, executed and acknowledged by her in the mode prescribed by statute.

IN CALIFORNIA, WIFE CAN CREATE NO LIEN OR ENCUMBRANCE ON HER SEPARATE PROPERTY, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon examination separate and apart from her husband.

WIFE HAS, IN CALIFORNIA, NO POWER BY CONTRACT TO CREATE PERSONAL LIABILITY against herself in any form, aside from exceptional cases, as under the act relating to sole traders.

RIGHTS OF MARRIED WOMEN AS TO THEIR SEPARATE PROPERTY, and their power over it in California, do not depend alone upon the principles of the common law, or upon the doctrines of courts of equity; but mainly upon the constitution and statutes of the state.

POWERS OF COURTS OF EQUITY RELATIVE TO SEPARATE ESTATE OF MARRIED WOMEN, discussed. Married women need no longer look to equity merely for the protection or the enjoyment of their separate estates. The statute is now the source of their right to, and power of disposition over, such estates.

POWER OF COURT OF EQUITY OVER SEPARATE ESTATE OF MARRIED WOMEN IN CALIFORNIA.—In this state a court of equity has no power to enforce any claim or demand as a charge or encumbrance on the separate estate of a married woman, unless such claim or demand has become a charge, lien, or encumbrance thereon, by virtue of a contract, evidenced by an instrument in writing, signed and acknowledged by the wife in accordance with the provisions of the statute.

ACT OF APRIL 17, 1850, defining rights and duties of husband and wife, and act of April 16, 1850, concerning conveyances, commented upon.

SEPARATE ESTATES AND THEIR INCIDENTS were originally creations of courts of equity.

RESTRICTIONS IMPOSED BY CALIFORNIA STATUTE, as to form in which married woman must encumber her separate estate, do not exist in equity.

MARRIED WOMAN CANNOT BIND HER SEPARATE ESTATE BY NOTE, ETC.—In California, a married woman cannot create a charge or encumbrance upon her separate estate by the execution of a note in consideration of services rendered, or moneys furnished, for her benefit, or the benefit of her separate estate, or by the purchase of goods for her separate use, with the intent and understanding that her separate estate shall be bound for the demand; nor can a court of equity impose and enforce such claim or demand as a charge or encumbrance upon her separate estate.

SECTION 6 OF ACT OF APRIL 17, 1850, DEFINING RIGHTS AND DUTIES OF HUSBAND AND WIFE, IS NOT UNCONSTITUTIONAL. The wife has a right to alienate or encumber her separate estate as there prescribed. If that portion of the section requiring the instrument to be signed by the husband were unconstitutional, it would not vitiate the remainder of the section, if valid in other respects. Requiring the signature of the husband is only an additional safeguard, and not so vitally connected with the object and scope of the act that it cannot be stricken out without vitiating the whole section.

ACT OF APRIL 17, 1850, DEFINING RIGHTS AND DUTIES OF HUSBAND AND WIFE IN CALIFORNIA, APPLIES "to property held as separate by woman married after the passage of the act," without reference to the time when it was acquired.

THERE IS MISJOINDER OF PARTIES WHERE HUSBAND AND WIFE ARE SUED, and no cause of action is shown against her.

THE government of Mexico, in 1845, granted to one of the defendants, Mary Love, then Mary Bennett, a tract of land lying in what is now Santa Clara County. The grant was

confirmed to her by a federal court, and she afterwards married the other defendant, Harry Love. Both defendants, in 1857, executed to H. S. Washburne their note for two hundred dollars for surveying said tract of land. In 1860, plaintiff sold defendant Mary Love goods of the value of \$27.40, and about the same time the note was assigned to him. For the sum due on the note, and for the goods, this action was commenced. A demurrer to the complaint was sustained, and plaintiff declining to amend, the court gave judgment for the defendants. Plaintiff appealed. Other facts are stated in the opinion.

C. T. Ryland, for the appellant.

T. H. Laine, for the respondents.

By Court, SAWYER, J. Plaintiff seeks to charge the separate property of Mary Love, the wife of defendant Harry Love, with the payment of a note executed by both defendants, for services alleged to have been rendered for the benefit of the separate estate of the wife, and at her request, with an alleged intent on the part of the wife to make the same a charge upon her separate estate. Also, for goods sold and delivered during coverture, to the wife, for her own use, and at her request, with a like alleged intent.

Section 6 of the act of April 17, 1850, "defining the rights and duties of husband and wife," provides, with respect to the separate property of the wife, that "no sale or other alienation of any part of such property can be made, nor any lien or encumbrance created thereon, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon examination separate and apart from her husband," etc.: Wood's Digest, 488.

It was repeatedly held by our predecessors that no title to the separate property of the wife, either real or personal, could be conveyed, except by an instrument in writing, executed and acknowledged by her in the mode prescribed by this act: *Selover v. American Russian Com. Co.*, 7 Cal. 266; *Barrett v. Tewksbury*, 9 Id. 13; *Morrison v. Wilson*, 13 Id. 501 [73 Am. Dec. 593], and other cases. The statute is as emphatic in its provisions against creating "any lien or encumbrance thereon," as against conveyances. The rights of married women as to their separate property, and their power over it in California, do not depend alone upon the principles of the common law or upon the doctrines of courts of equity; but mainly upon the

constitution and statutes of this state. It is not pretended that the defendant Mary Love is personally liable upon the contracts sued on; but it is insisted that, being the owner of separate property, as a necessary incident to such ownership, and to the *jus disponendi*, she has a right by contracts not imposing liabilities against her personally, to create a charge upon such property, which the courts will enforce. Admit this to be so, yet such charge must be created in some mode not prohibited by statute.

If a demand can be enforced as a charge against the separate property of the wife, it must in some form ultimately become a lien upon it, and result in a sale and conveyance of the property. The lien or encumbrance must originate in some action on the part of the wife, to be perfected and enforced by the courts by means of a sale. But the statute says that no sale or other alienation shall be made, nor any lien or encumbrance created thereon, except in a certain prescribed form. It is prohibitory in its terms. Aside from exceptional cases,—as under the act relating to sole traders,—the wife has no power by contract to create a personal liability against herself in any form. If she can create a charge upon her separate property, to be satisfied out of the separate property alone, independent of any personal liability, the charge must be to that extent a disposition or alienation of or an encumbrance upon such separate property. That she has the power to create such a charge there is no doubt, but she has no power to create it in any other mode than the one prescribed by the express provisions of the statute. And in this consists the difference between the case under consideration and those found in the chancery reports of England and the older states. In the latter cases, there was no statutory limitations as to the mode of contracting, while here there is. The wife, under our statute, can create no right against her separate property except in the mode prescribed. The prohibitory provisions of the act would be of little avail if the wife, by simply contracting a debt to be paid out of her separate estate, could create a valid and binding charge upon it. But she has no such power, and an attempt to create a charge by her contract in the form alleged would be simply void. Nor can a court of law or equity, in the face of the statute, create a right where none exists independent of its action. The office of a court is limited to the enforcement of rights already existing, by applying the appropriate remedy. The statute prescribes the

only mode by which debts can be created, and made a charge or encumbrance upon the separate estate of a married woman; and they must become a charge before a court of equity, in the language of Lord Cottenham, can "take upon itself to give effect to them, not as personal liabilities, but by laying hold of the separate property as the only means by which they can be satisfied."

A claim for which no person is individually liable, and which cannot by the simple act of any person be charged as an encumbrance upon property, is simply a nullity, and cannot serve as the foundation of a right upon which a court can build a superstructure for divesting a married woman of the ownership of her separate property.

In the case of *Miller v. Newton*, 23 Cal. 554, a majority of the justices—Cope, C. J., dissenting—took a different view of the question, holding that the provisions of the statute under discussion had no application to cases of this kind.

The prevailing opinion says: "The respondent refers to the cases of *Selover v. American Russian Com. Co.*, 7 Cal. 266, *Barrett v. Tewksbury*, 9 Id. 13, and other decisions of this court founded upon the statute relating to conveyances of property by a married woman. Those cases relate to the power of a married woman to execute instruments conveying or encumbering her separate property, and the mode in which such conveyance or encumbrance must be executed and acknowledged to be binding upon her, and they therefore differ entirely from the case now before us, in which no such question is directly involved. The statutes upon the subject, and upon which these decisions were founded, do not in any way abrogate or impair the powers of a court of equity over the rights and property of married women, or the long-established rules of those courts upon this subject, upon which this case depends. While these statutes confer upon married women a power to dispose of their property which they did not before possess, yet there is no expression of any legislative intention to thereby divest courts of equity of their long-established powers and jurisdiction. To effect such an object would require a clear expression of legislative will. These statutes are a substitute for the ancient common-law proceeding by fine and recovery, which was the only mode by which, at common law, a married woman could convey her real estate."

With due deference to the learned justice who delivered the opinion, we are unable to perceive any principle upon which

the class of cases he was considering, so far as he refers to that part of the demand accruing during coverture, can be distinguished from the cases cited.

The terms of the statute are very broad. It uses, among others, the precise term "encumbrance," which the learned judge, in this very opinion (unconsciously, perhaps, but naturally enough), employs to characterize demands charged upon separate estates. The opinion says: "In accordance with this principle, her separate estate will in equity be held liable for all the debts, charges, encumbrances, and other engagements which she expressly, or by implication, charges thereon."

So also in the passage from the decision of Lord Chancellor Brougham in *Murray v. Barlee*, 4 Sim. 82, cited in the prevailing opinion, it is said: —

"In all these cases, I take the foundation of the doctrine to be this: The wife has a separate estate, subject to her own control, and exempt from all other interference or authority. If she cannot affect it, no one can, and the very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discovert. The power to affect it being unquestionable, the only doubt that can arise is, whether or not she has validly encumbered it."

So appropriate is the word "encumbrance," or "encumbered," to express the idea of a charge upon property without any personal liability against the owner, that judges naturally, and almost necessarily, hit upon that very term to convey the idea in discussing the question. The last clause of the passage just cited is especially applicable to the case in hand: "The power to affect it [the separate property] being unquestionable," the only question "that can arise is, whether she [in this instance, Mary Love] has validly encumbered it." The statute says that no encumbrance can be created thereon unless by an instrument in writing, executed and acknowledged in a certain way, and the method designated was not pursued. There never was a time when a court of equity was authorized to enforce an encumbrance, until an encumbrance existed. And now, as before, a right must be created before the courts can be called upon to apply a remedy. It is not claimed, as seems to be supposed, that the statutes under consideration in any respect abrogate or impair the powers of the court to afford a proper remedy where the right exists. The act containing the prohibitory clause relates to the powers of the wife, not of

the courts, and the statute was not intended to relate to conveyances merely, as seems to be intimated. Its purpose was not to provide a substitute for fine and recovery and enable the wife to convey her property.

This act was passed on the 17th of April, 1850. On the day before,—the 16th,—the legislature had passed “An act concerning conveyances,” which was a substitute for the mode of conveyance under the Mexican law, and not in any sense as applied to California, for conveyance by fine and recovery, a mode of conveyance never in use in this state. That act was a general act relating to conveyances, and it made full provisions for the conveyance of the property of married women as well as of other parties. There was no necessity for any other provision on that head. The object and scope of the act under consideration was entirely different from that of the “act concerning conveyances.” Its object, as its title briefly indicates, and an examination of its various provisions will demonstrate, was to “define the rights and duties of husband and wife,” and particularly to prescribe the powers of both husband and wife with reference to their property, separate and common. And it is this act relating to the precise subject-matter under consideration, and not the act concerning conveyances, that contains the prohibitory clause. The minds of the legislators were particularly directed to the question. The whole object of the statute was to define the rights pertaining to the marriage relation, and particularly the rights and powers of the wife with respect to her separate property; and these rights were placed upon a basis entirely different from that which prevails under the common law. This act did not, in our view, “confer upon married women a power to dispose of their property which they did not before possess,” as also seems to be supposed in the prevailing opinion in *Miller v. Newton*, 23 Cal. 554, but it was a limitation of a power which already existed to a particular mode of conveyance and charging or encumbering their separate estates; and in the language of Cope, C. J., “the object of the statute [in thus limiting the power to the mode] was to protect the wife, not only as against her husband, but as against her own improvident acts, and persons dealing with her must see that the forms necessary to give validity to their contracts are complied with.”

It is not to be supposed that the legislators, with their minds especially directed to the subject, and having these objects in

view, used the comprehensive terms in the prohibitory clause of the statute in the restricted sense supposed in the prevailing opinion in *Miller v. Newton*, 23 Cal. 554, a sense that would defeat the only purpose, and render nugatory that important provision of the act. We think the case within the purview of the prohibition.

The prevailing opinion in *Miller v. Newton*, *supra*, appears to us to concede too much to the powers of courts of equity, and too little to the statutory modifications of the power of the wife.

It was a well-settled doctrine in England and the older states, that a married woman in equity could deal with her separate estate as though she were a *feme sole*. Originally, it is true, the establishment of separate estates in a married woman was an innovation upon the principles of the common law created by courts of equity. These estates originated in trusts for the separate use of married women. When courts of equity sustained the validity of these trusts, and recognized the wife's estate under them, it seemed to be the necessary result that she should have the power of disposition, and the power was accordingly conceded: *Yale v. Dederer*, 18 N. Y. 269 [72 Am. Dec. 503], and 22 Id. 451 [78 Am. Dec. 216], where the subject is fully and ably discussed.

"The right to charge her separate estate in equity resulted from the *jus disponendi* which courts of equity regarded her as having, and it was a necessary incident of the full enjoyment of her property": *Yale v. Dederer*, *supra*. The power of the wife to dispose of her separate estate is very generally made the basis of its liability to be charged with the debts incurred for her benefit, by the English chancellors, even including Lord Cottenham (who comes the nearest to repudiating the doctrine), though hardly any two of them agree in their reasoning by which the liability is worked out or deduced from the *jus disponendi*, as will be seen from an examination of the elaborate review of the cases in *Yale v. Dederer*, 22 N. Y. 451 [78 Am. Dec. 216]. Selden, J., in concluding his comments on the cases, and particularly referring to the reasoning of Lord Cottenham, says (p. 459): "The truth would seem to be, that this mode of dealing with the estates of married women, to the extent to which it has been carried by the English courts, could not be sustained by any process of legal reasoning, and hence the grounds upon which it was made to rest have been repeatedly changed, and the rule itself has been fluctuating

and uncertain. . . . The views of Lord Cottenham are no more likely to be permanent than those of his predecessors. Some future lord chancellor may detect the fallacy of his reasoning, as he detected that of Lord Brougham. No rule can ever be stable, the reasons for which are constantly changing. If we desire precision and certainty in this branch of the law, we must recur to the foundation of the power of a *feme covert* to charge her separate estate; and this has heretofore arisen solely from her incidental power to dispose of that estate.

“Starting with this point, it is plain that no debt can be a charge which is not connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would of course become a lien, upon a well-founded presumption that the parties so intended, and in analogy to the doctrine of equitable mortgages for purchase-money. But no other kind of debt can, as it seems to me, be thus charged without some affirmative act of the wife evincing that intention.”

But these remarks refer to countries where there is no express limitation upon the power or mode of making the contract with reference to encumbering the estate, as under the equity system of England, and under the statute of New York, which, unlike ours, contained no restriction in this particular.

Thus it will be seen that, though separate estates and their incidents were originally the creations of courts of equity,—established, perhaps, by a usurpation of powers,—yet the liability of the separate estate is based upon the recognized ownership of the property; a power of disposition as an incident to the ownership; and a contract actually made by the owner by which a charge upon the estate is created, thereby making to the extent of the charge an inchoate disposition of the property. A right is thus created, for the enforcement of which—a court of law being inadequate—a court of equity affords the remedy.

But in our state, the rights of the parties are fixed by statute, and the only duty or power of the court is to enforce those rights in accordance with the spirit of the statute, as plainly indicated by the letter. Had we never been educated under the double system of common and equity law, as they prevail in England and the older states, we should have little difficulty with the statute before us, as we apprehend, in determining the rights of the parties in respect to the questions under consideration.

The following remarks by Selden, J., in the case last cited (p. 460), are not inappropriate on the present occasion:—

“But there is a strong additional reason why this court should decline, at this time, to adopt the fictitious theories on this subject which have so long prevailed in the English courts. Married women are not hereafter to be indebted to equity merely for protection or the enjoyment of their separate estates. They hold them by a legal title, and have a legal right to dispose of them. The acts of 1849 and 1860 [in this state the act of 1850] are henceforth, if not repealed, to be the source of their power over such estates. There is no longer any foundation for the argument, that as equity creates and protects these estates, equity has a right to control them. Rules, therefore, which have grown up under this idea,—which I regard as to some extent illusory,—will be hereafter inappropriate.”

Under our statute, as we read it, the wife is endowed with a capacity to hold separate property as fully, at least, as she could under the principles recognized by courts of equity. She also has the power to dispose of or encumber it as she had in equity; but in this she is restricted as to the manner of effecting the disposition or encumbrance by the prohibitory clauses of our statute, whereas in equity there was no such restriction. When a charge or encumbrance has been created in the mode recognized by law, the courts will afford the remedy by enforcing it, as courts of equity would have done. But until such charge or encumbrance is legally created, there is no right to enforce, and of course no remedy can be afforded; neither could there have been under the principles of a court of equity. The whole question is narrowed to the form in which the encumbrance is to be created, and not to the power to create it.

But if the case is held to be within the prohibitory clause of the sixth section of the “act defining the rights and duties of husband and wife,” it is insisted that the provision is unconstitutional. Conceding, for the purposes of the argument, that portion of the section requiring the instrument to be signed by the husband to be unconstitutional,—a question we do not now intend to decide,—this will not vitiate the remainder of the section if valid in other respects. Requiring the signature of the husband is only an additional safeguard, and it is not so vitally connected with the object and scope of the act that it cannot be stricken out without vitiating the whole section.

It will therefore only be necessary to consider the constitutionality of that part of the section which prohibits the wife from alienating or encumbering her separate property in any other manner than by an instrument in writing, manifesting her intention, signed by her, and acknowledged in the mode prescribed. We do not think this portion contravenes any constitutional provision. It does not prohibit her from disposing of or encumbering all or any part of her separate estate, upon such terms as to her may seem proper. It does not in the slightest degree interfere with her free will. It only prescribes the mode in which she shall manifest that will. It was undoubtedly the object of the statute to provide a mode of alienation and of encumbering her estate, uniform, simple, and conclusive, which should protect both the wife and the purchaser; one that should secure entire freedom of will and action to the wife, and afford the least possible opportunity for subverting her interest through the medium of undue influence, threats, or fraud. It is a beneficent provision intended for her benefit, and not as an encroachment upon her rights. And we think its obvious tendency is to throw a safeguard around, without in any degree impairing, the *jus disponendi*.

But it is further insisted that the statute was not intended to apply to cases where the property was acquired before the passage of the act, and for this reason the provision is inapplicable, and *Ingoldsbey v. Juan*, 12 Cal. 564, is cited to sustain this position. But if this case can be said to decide the question at all, it recognized the applicability of the provision "to property held as separate by women married after the passage of the act" (p. 580), without reference to the time when it was acquired, and such seems to be the express provision of the statute. Section 14 provides that, "in every marriage hereafter contracted in this state, the rights of the husband and wife shall be governed by this act, unless there is a marriage contract containing stipulations contrary thereto." There is no allegation that the marriage took place before the passage of the act, or that there is a marriage contract containing stipulations in any respect contrary thereto. As the allegations of the complaint must be construed most strongly against the plaintiff, we cannot presume that any fact exists taking the case out of the operation of the statute, and none is alleged.

It follows that the facts stated do not constitute any cause of action against Mary Love, and there is a misjoinder of parties. As to the second cause of action for the goods alleged to

have been sold to the wife, no cause of action is shown against the wife, for the reasons already stated,—and none is pretended to be shown against the husband. No sale to him, or to his wife on his credit or account, and no promise by him, is alleged. The contract alleged is entirely upon the theory that plaintiff contracted with the wife alone as the owner of separate property, on the basis and credit of her separate property, the debt to be charged upon that alone. No contract with the husband is averred. No cause of action, therefore, is shown against either. This leaves the action, as against the husband, to rest upon the note, which is only for two hundred dollars.

We think the demurrer was properly sustained.

Judgment affirmed.

CURREY, J., dissented.

RHODES, J., expressed no opinion.

WIFE'S POWER TO DISPOSE OF OR CHARGE HER SEPARATE ESTATE: *Robinson v. Executors of Dart*, 31 Am. Dec. 569; *Burch v. Breckinridge*, 63 Id. 553, and collected cases in note thereto 558; extended note to *Yale v. Deiderer*, 72 Id. 512-514. As to the rule in equity, see particularly cases cited in *Dyett v. North American Coal Co.*, 32 Id. 602; *Hollis v. Francois*, 51 Id. 760; *Willard v. Eastham*, 77 Id. 366, and note 372.

POWER OF FEME COVERT OVER SEPARATE ESTATE IN ABSENCE OF STATUTORY REGULATION: See extended note to *Thomas v. Folwell*, 30 Am. Dec. 233-241.

SEPARATE PROPERTY OF WIFE AS AFFECTED BY AMERICAN STATUTES: See extended note to *Kirkpatrick v. Buford*, 76 Am. Dec. 367-401; *Hollis v. Francois*, 51 Id. 760.

NOTES, BONDS, OR AGREEMENTS OF MARRIED WOMAN ARE VOID AT COMMON LAW: *Hollis v. Francois*, 51 Am. Dec. 760.

POWER OF MARRIED WOMEN, IN TEXAS, OVER THEIR SEPARATE ESTATES do not depend on doctrines of courts of equity, but on the statute, which provides a special mode for the conveyance or transfer of the wife's separate property, which must be pursued to give her power to charge her separate estate: *Hollis v. Francois*, 51 Am. Dec. 760.

STATUTE PRESCRIBING MODE OF CONVEYING WIFE'S PROPERTY DOES NOT DECLARE ABSOLUTELY VOID any other mode of conveyance: See *Womack v. Womack*, 58 Am. Dec. 119, and note 124. But conveyances by wife should be strictly construed to protect her right: *Sharp v. Bailey*, 81 Id. 469.

THE PRINCIPAL CASE WAS CITED in the following authorities, and to the point stated: Married woman has no power to charge or transfer her real estate in any other mode than that prescribed by statute: *Reis v. Lawrence*, 63 Cal. 139, dissenting opinion; *Norton v. Meader*, 4 Saw. 620; *Smith v. Greer*, 31 Cal. 478, 479; *Belloc v. Davis*, 38 Id. 256; *Leonis v. Lamarovitch*, 55 Id. 58. The doctrines of the principal case were approved in *Pippen v. Wesson*, 74 N. C. 444; *Leonard v. Townsend*, 26 Cal. 446; and commented upon

at length and followed in *Smith v. Greer, supra*. A married woman cannot charge her separate estate by note. She has no capacity to create a personal liability: *Brown v. Orr*, 29 Cal. 120, holding that the joint note of husband and wife is the note of her husband alone: *Smith v. Greer*, 31 Id. 476, 479; *Belloc v. Davis*, 38 Id. 256. There can be no personal judgment against the wife: *Althof v. Conheim*, 38 Id. 233. But a married woman, acting as sole trader, may be bound by her note: *Camden v. Mullen*, 29 Id. 566. In *Dow v. Gould and Curry S. M. Co.*, 31 Id. 644, the constitutional question, referred to in the principal case, was said to have been expressly reserved, and not directly passed upon; but in *McCready v. Sexton*, 29 Iowa, 399, the court cited the principal case, among many others, to show that that part of a statute which is considered unconstitutional may be stricken out, and if enough remains to be intelligibly acted upon, it is the law of the land. "It is well settled in England and the older states, that, unless specially restrained by the instrument under which the separate estate is acquired, a married woman, in equity, could deal with her separate estate as a *feme sole*; that it being once established that a wife might enjoy separate estate as a *feme sole*, the laws of property attached to this new estate, and as a part of such law the power of alienation belonged to the wife": *Racouillat v. Sansevernia*, 32 Cal. 385. But while adhering to the principal case in *Love v. Watkins*, 40 Id. 558, the court held that a married woman's contract, made previous to marriage, if valid, must be performed. But this precise question was not in the principal case. Prior to the act of April 3, 1863, a married woman could not sell and convey her separate estate by an attorney in fact, but had to do so *in propria persona*: *Denzel v. Waldie*, 30 Id. 143. The amendment of May 12, 1862, to the act of 1850, defining the rights of husband and wife, freed the personal separate estate of the wife from the rule laid down in the principal case: *Friedberg v. Parker*, 50 Id. 103, 105; *Terry v. Hammond*, 47 Id. 32, 37-39. Since that amendment, courts of equity will enforce liens against such personal property, as for services, supplies, etc.: *Id.*

UNION WATER COMPANY v. CBARY.

[25 CALIFORNIA, 504.]

PLAINTIFF IS NOT ENTITLED TO JUDGMENT ON PLEADINGS, where the defendant denies the right of the plaintiff, and sets up title in himself.

WATER RIGHT ON PUBLIC MINERAL LANDS MAY BE ACQUIRED BY APPROPRIATION. — The right to the use of a watercourse in the public mineral lands, and the right to divert and use the water taken therefrom, may be acquired by appropriation and user, and held, granted, abandoned, or lost, by the same means as a right of the same character issuing out of lands to which a private title exists.

WATER RIGHT ON PUBLIC MINERAL LANDS MAY BE ACQUIRED BY ADVERSE POSSESSION. — The right of the first appropriator of water on public mineral lands may be lost by the adverse possession of another; and when such person has had the continued, uninterrupted, and adverse enjoyment of the water, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him.

PRACTICE AS TO EVIDENCE IN ACTIONS FOR DIVERTING WATER. — Where the answer, in an action for the wrongful diversion of water, sets up more than five years' continuous adverse possession in the defendant, and the plaintiff before resting introduces evidence tending to show his possession during the five years, and the defendant then introduces evidence to sustain the answer, the plaintiff may, if he does not wish to rely upon the proof already offered by him upon the same points, produce evidence tending to show that the defendant's enjoyment of his asserted right had not been continuous or uninterrupted or adverse. Such evidence is not in rebuttal, but is a part of the plaintiff's original case, and is admissible only in the discretion of the court, and for the furtherance of justice. He has no right, for such a purpose, to enter upon his original case and again prove the same facts that were proved by him in his opening.

PLAINTIFF'S WITNESSES CANNOT BE RE-EXAMINED BY HIM AFTER HE HAS CLOSED and defendant has introduced his evidence, except in the discretion of the court, where the issue between the parties is a contest between them as to which had the better right to a watercourse founded on prior possession and continued user, and the object of the offer is, in substance, to prove the same facts, perhaps more in detail, that those witnesses had testified to in chief for the plaintiff.

ERROR IN ADMITTING TESTIMONY MAY BE CURED BY INSTRUCTIONS to the jury to disregard such testimony; and when so cured, the error is not sufficient to entitle the objecting party to a new trial.

GRANT OF USE OF WATER MAY BE PRESUMED WHEN, in an action for the wrongful diversion of the water, the jury are satisfied from the evidence that the defendants have been in the continued, adverse, uninterrupted possession, use, and enjoyment of the water in dispute for five years preceding the commencement of the action.

WATER MAY BE LAWFULLY DIVERTED, if returned to its original channel without material diminution in quantity or quality, and at a point above the place where the original appropriator has use for it. In such a case, the first appropriator has no cause of action against the diverter.

DEFENDANT'S ditch was excavated on the side of a mountain above the plaintiff's ditches, and took the water from the same stream, at a point about three quarters of a mile above plaintiff's ditches. The water was used by the defendant for working his claim, and was then allowed to flow into plaintiff's ditches, down another ravine about a mile distant from the one where it was diverted. Judgment for defendant, and plaintiff appealed. Defendant requested the following instructions, which were given: 1. If the defendant and his grantors have been in the continued, adverse, uninterrupted possession, use, and enjoyment of the waters in dispute for the period of five years preceding the commencement of this suit, the jury must find for the defendant; 2. If, after defendant's use of the water, it flows back into a cañon, and without material diminution in quantity or quality it is again conducted by plaintiff into his ditch, and used by him as it would have been used

but for the diversion by defendant, the jury must find for defendant. Other facts are stated in the opinion.

Tuttle and Hillyer, for the appellant.

Jo Hamilton and P. L. Edwards, for the respondent.

By Court, RHODES, J. The plaintiff is the owner of two water ditches, constructed for mining purposes, which conduct the water from a cañon, and the defendant owns a third ditch, which heads in the same cañon, above the plaintiff's ditches. The plaintiff claims the right to the water, on the ground of a prior appropriation and a continuous user down to a time subsequent to May, 1861, when it is alleged the defendant diverted the water into his ditch. The object of the action is to recover damages for diverting the water, and to enjoin the defendant from the further diversion of it from the plaintiff's ditches. The defendant had a verdict and judgment, and the plaintiff appeals from the judgment and the order denying the motion for a new trial.

In considering the errors assigned, several points may be passed upon at the same time.

1. The plaintiff was not entitled to a judgment on the pleadings, for the defendant denies the right of the plaintiff, except where the water has receded to four inches, and he sets up title in himself; and we hold that those matters, as set up in the answer, do constitute a defense to the plaintiff's action.

2. After the plaintiff had rested, and the defendant had introduced his evidence, the plaintiff "offered to prove by William McClure, one of the former owners of plaintiff's ditches, and James McClure, former agent, that in 1853, 1854, 1857, 1858, 1859, and 1860, plaintiff had possession of and used in its ditches during all the summer season, except when there was a surplus, [the] water in controversy," and the testimony was excluded on the objection of the defendant. The plaintiff alleges in its complaint that it now owns two ditches; that the ditches were constructed by its grantor in 1851 and 1852; that by means thereof, the plaintiff's grantors diverted and appropriated the waters of the cañon; that the plaintiff has owned the ditches since August, 1853; and that, by means of the ditches, since they were excavated, the plaintiff and his grantors have continuously, up to May, 1861, used, appropriated, diverted, and enjoyed the waters flowing down said cañon above the plaintiff's ditches.

The defendant, in his answer, after denying that the plain-

tiff or his grantors ever had or claimed any right to the water of the cañon above where his ditch heads, except as the owners of his ditch permitted them to use such water, avers that he is the owner of said ditch, and that he and his grantors, ever since the summer of 1853, have been the owners, and in the peaceable and quiet possession thereof; that the same was constructed, and ever since has been used, for the purpose of conveying the waters of said cañon; that they have had the quiet and peaceable possession of said waters, and have continuously, during nine years past, diverted all of said waters that could be conveyed in their ditch; that they had the right so to do; that by "virtue of such continuous use, enjoyment, and appropriation of said water," which use and possession "has been held by them adversely, and against all claimants," the defendant is the owner, and entitled to the use, enjoyment, and diversion of said water; and "that by reason of the nine years' use and enjoyment and diversion, and the adverse possession of the same, he has acquired the title thereto"; and that the defendant has never disputed the plaintiff's title, until the commencement of the present suit.

The plaintiff thus asserts title founded upon prior appropriation, in 1851 and 1852, and the continued appropriation down to the time of the alleged diversion by the defendant in 1861; and the defendant asserts title acquired by prior appropriation in 1853, together with continuous use from that time to the commencement of the action in 1862. He also relies upon title by prescription. The court below, and the plaintiff, have treated the answer as setting up the statute of limitations in bar of the action. We do not so understand the answer. Although it is not pleaded with great accuracy or technical precision, it contains all the substantial allegations necessary in a case where a party sets up title to an incorporeal hereditament, which has accrued to him by the continued, uninterrupted, adverse use and enjoyment,—a title by prescription. The right to the use of a watercourse in the public mineral lands, and the right to divert and use the water taken therefrom, is acquired by appropriation and user, the person first appropriating it being deemed to have the title as against all the world, except the United States and persons claiming under them, to the extent that he thus appropriated it before the rights of others attached. The rights thus acquired may be held, granted, abandoned, or lost, by the same means as a right of the same character issuing out of lands to which a

private title exists. The right of the first appropriator may be lost, in whole or in some limited portions, by the adverse possession of another. And when such person has had the continued, uninterrupted, and adverse enjoyment of the water-course, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him: *Bealey v. Shaw*, 6 East, 208; *Balston v. Beusted*, 1 Camp. 463; *Ricard v. Williams*, 7 Wheat. 59; *Williams v. Nelson*, 23 Pick. 141 [34 Am. Dec. 45]; *Colvin v. Burnet*, 17 Wend. 562; *Hammond v. Zechner*, 23 Barb. 473.

The defendant having proven facts sufficient to warrant the jury in presuming a grant in his favor, the plaintiff, not wishing to rely upon the proof offered by it upon the same points, was at liberty to produce evidence tending to show that the defendant's enjoyment of his asserted right had not been continuous or uninterrupted or adverse; but it was not authorized for that purpose to enter upon its original case, and again prove the same facts that were proved by it in making its *prima facie* case. At least, such evidence would be admissible only in the discretion of the court below in furtherance of justice,—not in rebuttal, but as a part of the plaintiff's original case.

The other issue between the parties was, as already stated, a contest between them as to which had the better right, founded on prior possession and continued user. The plaintiff had called upon the same witnesses that he then offered, to prove its continuous possession and use, and they had testified concerning those matters, and the offer was in substance to prove the same facts (perhaps more in detail) that those witnesses had testified to in chief for the plaintiff. The examination of those witnesses upon the same point was not permissible, except in the discretion of the court.

3. The plaintiff further assigns for error the admission of the testimony of Randolph, and the deposition of Beegan, so far as the same related to an arrangement between the defendant's grantors and the plaintiff's agent, on the ground that there was no proof that the agent had authority to make such an arrangement. It is sufficient on this point to say that the court, by its instructions, excluded that testimony from the consideration of the jury, the court instructing them that the agent's acts in that behalf were void, because he had no authority, and there was no proof of the ratification of his acts by the company.

The plaintiff further objects to the testimony of those witnesses, because it was attempted to be proven by them, by parol, that the defendant's grantors had sold and conveyed the ditch to him. It is alleged in the answer, and not denied in the replication, that the persons who constructed the defendant's ditch sold the same to two persons, who afterward sold it to the defendant, and no evidence was needed on that point. Those sales were proven by parol evidence, without objection on the part of the plaintiff, by two other witnesses, and the record contains no objection to the testimony of Randolph on that ground. The admission of the testimony complained of, though improper as it was offered, yet, under the circumstances, did not amount to an error sufficient to entitle the plaintiff to a new trial.

4. The first instruction given at the request of the defendant was proper, under the pleadings. If objectionable at all, it is on the ground that it does not go far enough, for the court might have charged the jury that, if they found that "the defendant and his grantors have been in the continued, adverse, uninterrupted possession, use, and enjoyment of the waters" for five years preceding the commencement of the action, they would be justified in presuming a grant to the defendant. The charge, as given, had relation to the probative facts upon which title by prescription depended, rather than to the ultimate fact of title. In that view it was not erroneous: *Hammond v. Zechner*, 23 Barb. 473. The second instruction was proper, for if the plaintiff had title to the water, and had not been injured by the acts of the defendant, the plaintiff had no cause of action against him.

The instructions concerning the adverse possession and prescription, given at the request of the plaintiff, were very favorable to it, and obviated whatever objection there might be to the defendant's instructions upon the same matter. The remaining points in the assignment of errors do not require a separate consideration.

Judgment affirmed.

SAWYER, J., concurring specially. I concur in the judgment.

ACQUISITION OF WATER RIGHTS, BY APPROPRIATION, ON MINING AND OTHER PUBLIC LANDS: See *Conger v. Weaver*, 65 Am. Dec. 528, and note 533; *Maeris v. Bicknell*, 68 Id. 257, and note 260; *Bear River etc. Mining Co. v. New York Mining Co.*, 68 Id. 325, and note 331; note to *McClintock v. Bryden*, 68 Id. 91, 93.

ACQUISITION OF WATER RIGHTS, BY ADVERSE POSSESSION: *Burden v. Stein*, 62 Am. Dec. 758; *Townsend v. McDonald*, 64 Id. 508; *Pillsbury v. Moore*, 69 Id. 91, and note 94.

RIGHT OF PRIOR APPROPRIATOR TO HAVE WATER, DIVERTED BY ANOTHER, RETURNED TO ITS ORIGINAL CHANNEL UNDIMINISHED IN QUANTITY AND UNIMPAIRED IN QUALITY: See collected cases in *Dilling v. Murray*, 63 Am. Dec. 389; note to *Bear River etc. Mining Co. v. New York Mining Co.*, 68 Id. 331; collected cases in note to *Davis v. Getchell*, 79 Id. 639.

RIGHT TO DIVERT WATER FOR MINING PURPOSES: See *Kidd v. Laird*, 76 Am. Dec. 472, and note 479; *Irwin v. Phillips*, 63 Id. 113, and note 116.

RE-EXAMINATION OF WITNESS UPON NEW MATTER LIES IN DISCRETION OF COURT: *People v. Mather*, 21 Am. Dec. 122; *Clark v. Force*, 30 Id. 53.

CAN ERROR COMMITTED IN ADMITTING IMPROPER EVIDENCE BE CURED BY INSTRUCTION TO DISREGARD IT? *Pavey v. Burch*, 26 Am. Dec. 682, and note 684; *Northampton Bank v. Ballist*, 42 Id. 297.

THE PRINCIPAL CASE WAS CITED IN *American Co. v. Bradford*, 27 Cal. 366, *Davis v. Gale*, 32 Id. 35, and *Woolman v. Garringer*, 1 Mont. 544, to the point that an exclusive and uninterrupted enjoyment of water, in any particular way, for a period corresponding to the time limited by statute within which an action must be commenced for the recovery of the property, or of he assumed right held and enjoyed adversely, becomes an adverse enjoyment sufficient to raise a presumption of title as against a right in any other person which might have been, but was not, asserted.

MITCHELL v. HOCKETT AND DICKENSON.

[25 CALIFORNIA, 583.]

TAKING NOTE OF DEBTOR, OR OF THIRD PERSON, FOR PRE-EXISTING DEBT IS NO PAYMENT, unless it be expressly agreed to take the note in payment, and run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment in due time. It simply postpones payment of the old debt until a default is made in the payment of the note.

AGREEMENT TO ACCEPT NOTES IN SATISFACTION OF JUDGMENT AND EXECUTION, HOW PROVED.—The plaintiff in an execution may, by express agreement, but not otherwise, accept promissory notes as an absolute payment of the judgment and execution. The sheriff's certificate is not, however, proof of such agreement. It must be proved by other evidence.

EVIDENCE OF SATISFACTION OF EXECUTION.—Sheriff's return, indorsed on an execution that it is satisfied by promissory notes received for the amount due on it, is not evidence of the satisfaction of the judgment on which it issued, and cannot be admitted in evidence as tending to prove a satisfaction of the same.

THIRD PARTIES MAY PURCHASE JUDGMENT AND TAKE ASSIGNMENT OF IT, with or without notice.

RULE OF CAVEAT EMPTOR APPLIES IN PURCHASE OF JUDGMENT, so far as third persons are concerned, in the same manner as it does to the purchase of any other personal property. If the assignor has no title, the purchaser will take none, whether he has notice of such fact or not.

ASSIGNMENT OF JUDGMENT NEED NOT BE UNDER SEAL.

JUDGMENT MAY BE SATISFIED BY EXECUTION WITHOUT RETURN OF NOTE FRAUDULENTLY GIVEN IN SATISFACTION OF IT. — Where a judgment debtor delivers to the judgment creditor a promissory note of third persons in satisfaction of the judgment, which is void because fraudulently obtained by the judgment debtor from the payors, it is unnecessary for the judgment creditor to return the note before enforcing his judgment by execution.

NO ERROR IS COMMITTED BY WITHDRAWING SPECIAL ISSUES FROM JURY AND RECEIVING GENERAL VERDICT, if counsel on both sides consent to it, where the jury announce that they cannot agree upon the special issues submitted to them, but can agree upon a general verdict.

MITCHELL, the plaintiff, in 1854, recovered a judgment against J. H. Gardenhire, and on the same day assigned it, in writing, to Terry and Perley. The assignment was immediately deposited with the clerk of the court. Mitchell took out execution on the judgment in 1856, and put it into the hands of Kirk, the sheriff, who levied on property claimed by a son of Gardenhire. Mitchell and four others indemnified the sheriff, and he sold the property. Gardenhire's son sued the sheriff, and Hockett and Dickenson, appellants here, who were his official bondsmen, for taking the property, and recovered judgment. This judgment was collected from Hockett and Dickenson, and to protect them the sheriff assigned to them the indemnifying bond which he had received from Mitchell and others. Hockett and Dickenson then sued Mitchell on the indemnifying bond, and recovered judgment for \$670.32, costs. Execution was issued on the same, and the sheriff levied on Mitchell's property. Mitchell then caused a second execution to be issued on his judgment against Gardenhire, and a levy to be made on property, when Gardenhire's son and one Martin gave Mitchell their note for the amount due on the judgment against Gardenhire, and the levy was released. Martin and young Gardenhire claimed that Mitchell agreed to assign them the judgment in consideration of the note. Mitchell assigned the note to Hockett and Dickenson, and the sheriff released the property levied on, and returned their execution against Mitchell with the indorsement mentioned in the opinion. Hockett and Dickenson sued young Gardenhire and Martin on the note, and they interposed a defense that Mitchell did not own the judgment for which the note was given, and had obtained the note by fraud, etc. Hockett and Dickenson were beaten in the suit, but caused another execution to be issued on their judgment against Mitchell, and the sheriff levied on Mitchell's property.

Mitchell then commenced this action to enjoin the sale of his property, and further proceedings on the judgment, upon the ground that the judgment had been paid. The third instruction referred to in the opinion was as follows: That if the jury believe from the evidence that Hockett and Dickenson received the note of Martin and Gardenhire from Mitchell in satisfaction of their judgment against him, they had no right to again enforce execution on said judgment until they had returned said note to Mitchell; or in other words, they must place Mitchell in the same position he was in at the time they received the note. Judgment for plaintiff, and defendants appealed. Other facts are stated in the opinion.

L. Quint, for the appellants.

S. Heydenfeldt, and Dwinells and Shafter, for the respondent.

By Court, SAWYER, J. Plaintiff introduced in evidence an execution in the case of *Hockett v. Mitchell*, and the return of the sheriff indorsed thereon in the words following: "I return this execution satisfied by two notes of hand,—one for \$91.72, and the other \$650, making in all \$741.72,—and the above property is released. July 20, 1857."

The object was to prove the satisfaction of the judgment,—the main issue in the case. The defendants objected to the introduction of the return, on the ground that it was improper evidence to prove satisfaction of the judgment. The objection was overruled, and defendants excepted.

If this return contained any element entitled to be considered, which tended to prove satisfaction of the judgment, it was admissible. But we think it does not. The officer, by virtue of his office, had no authority to accept notes in satisfaction of the judgment, and no authority to certify any other act than one performed in the proper exercise of his powers. The judgment creditor may, undoubtedly, by an express agreement, receive a promissory note in satisfaction of a judgment or any other antecedent debt. But it must be by an express agreement. "It is a rule well settled . . . that taking a note, either of a debtor or of a third person, for a pre-existing debt, is no payment, unless it be expressly agreed to take the note in payment, and run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment in due time. . . . It only postpones the time of payment of the old debt until a default be made

in the payment of the note": *Tobey v. Barber*, 5 Johns. 68 [4 Am. Dec. 326]; *Griffith v. Grogan*, 12 Cal. 322.

If there was any satisfaction of the judgment and execution, it was by an acceptance of the notes referred to in the return by the plaintiff in the execution, under a special agreement to take the paper as absolute payment; and it was necessary to prove such acceptance and agreement by testimony other than the sheriff's certificate. The sheriff's certificate upon that point was no more entitled to be considered than the certificate of any other person. His return that it was satisfied in the particular manner specified, in effect amounts to nothing more than a certificate that the plaintiff received the notes under a special agreement to accept them as an absolute payment and extinguishment of the debt, and in satisfaction of the judgment. The certificate being incompetent to prove these facts, it was error to admit it in evidence. As it was admitted, the jury must be presumed to have considered and given it weight in making up their verdict.

The defendants allege, and introduce testimony tending to prove, that the notes referred to in the sheriff's return (being non-negotiable notes) were obtained by plaintiff by fraud practiced by him upon the makers, Martin and Gardenhire; that the consideration of the notes was the assignment to the makers of a judgment represented by plaintiff to be then held by him against J. H. Gardenhire,—the father of one of the makers,—when, in fact, the said plaintiff had, before the making of said notes, assigned said judgment to other parties; that at the time of the assignment to Martin and Gardenhire he did not own the judgment; and that there was therefore no consideration for the notes, and they were fraudulently obtained. There was testimony, also, tending to show that the first assignment of said judgment was made by a written instrument under seal, and filed among the records of the case on the day of its recovery. But it was claimed by plaintiff that the testimony was insufficient to show that the instrument had a seal.

With reference to this testimony, the court, at the request of the plaintiff, and under objection and exception on the part of the defendants, gave the following instruction: "That an assignment of a judgment entered in a court of record, in order to give notice to third parties, must be under seal and filed and entered in the clerk's office where the judgment was entered. That if they believed from the evidence that no such

assignment was made by plaintiff, then that the plaintiff could enforce the collection of such judgment by execution, and that any settlement which he might make would be a full discharge of the defendants." This instruction, if it contains any principle proper to be stated to the jury, is so ambiguous that it must necessarily have confused and misled them. The first part of the instruction as to "notice to third parties," seems to refer to the assignees of the judgment under the assignment made in consideration of the notes. Treating them as third parties purchasing the judgment, we are not aware of any rule of law that makes any notice, actual or constructive, necessary in order to prevent them from taking title by an assignment. If they buy a judgment, the rule of *caveat emptor*,—so far as any interest acquired as against third parties is concerned,—applies to them in the same manner as in the purchase of any other personal property. If the assignor has no title they will take none, whether they have notice or not. The latter part of the instruction, referring to "any settlement" which "would be a full discharge of the defendants," must refer to some party different from the "third parties" mentioned in the first part of the instruction. If the judgment debtor should pay to his judgment creditor the amount of his judgment before notice of the assignment, he would be discharged. If it was intended to instruct as to any principle of law applicable to these different classes of parties, the instructions should have been presented in distinct propositions, and in such a manner that the jury could clearly comprehend the scope and purpose of the instructions, and be able to apply them intelligently to the testimony.

It is not necessary that an assignment of a judgment should be made under seal: *Ford v. Stuart*, 19 Johns. 342.

If the jury attempted to make anything at all out of this instruction, or attempted to apply it to the testimony, they must almost necessarily have been misled, and it was the leading instruction in the case.

The third instruction, given at the request of the plaintiff, if correct in other respects, ignores the question of fraud in obtaining the note and in inducing defendants to accept it. If the note was a nullity on account of any fraud perpetrated by Mitchell, as there is testimony tending to show, it would not be necessary for defendants to return it before enforcing their judgment by execution. Conceding such necessity when the transaction was made in good faith, still, the acceptance of

the note under such circumstances as is claimed by the defense to have been shown by the testimony would vitiate the agreement.

As was very proper in this class of cases, the cause was submitted to the jury upon special issues. It is very remarkable, when we consider the question submitted, that they could not agree upon the special issues, but did agree upon a general verdict. But counsel, before the verdict was announced, upon the statement of the jury that they could not agree upon the special issues, consented to receive the general verdict, and there was no error in this.

There are many other points made, which we do not consider it necessary to notice.

We think the judgment should be reversed and a new trial had, and it is so ordered.

SHAFTER, J., having been of counsel, did not participate in the decision of this case.

PROMISSORY NOTE GIVEN FOR PRECEDENT DEBT WILL NOT EXTINGUISH ORIGINAL CLAIM, unless there is an express agreement to receive the note as payment: *Blunt v. Walker*, 78 Am. Dec. 709, and note 718; *Weymouth v. Samborn*, 80 Id. 144, and note 149; *Barnet v. Smith*, 64 Id. 290; compare note to *McMurray v. Taylor*, 77 Id. 613.

PAYMENT OF JUDGMENT CAN BE IN MONEY ONLY: See note to *Welch v. Frost* 48 Am. Dec. 696; *Crutchfield v. Robins*, 42 Id. 417. Receipt of choses in action will not satisfy it: See case last cited.

SHERIFF'S RECEIPT OF NOTE INSTEAD OF MONEY, EFFECT OF, AS TO SATISFACTION OF EXECUTION: See *Holt v. Robinson*, 56 Am. Dec. 240.

ASSIGNMENT OF JUDGMENTS: *De la Vergne v. Evertson*, 19 Am. Dec. 411; extended note on the subject to *Dugas v. Matheus*, 54 Id. 366-369. Judgment may be assigned like chose in action: *Wright v. Yell*, 58 Id. 336.

NECESSITY OF NOTICE OF ASSIGNMENT OF JUDGMENT OR CHOSE IN ACTION: See note to *Gaullagher v. Caldwell*, 60 Am. Dec. 87; note to *Fisher v. Knox*, 53 Id. 507; *Styles v. McNeil's Heirs*, 17 Id. 183.

THE PRINCIPAL CASE WAS CITED in *Hiles v. Peck*, 30 Cal. 289, to the point that it is the official duty of the sheriff to make, in his deed, a recital of the judgment, names of the judgment debtor and creditor, execution, and the levy and sale thereunder; and that these recitals, as evidence, are entitled to be same weight as the return on execution, if one be made.

DAVIS v. DAVIS.

[26 CALIFORNIA, 23.]

WHO ARE REPRESENTATIVES—WITNESSES.—In statute which provides that no person shall be allowed to testify in an action where the adverse party, or the party for whose immediate benefit the action is prosecuted or defended is the representative of a deceased person, where the facts to be proved transpired before the death of such deceased person, the word "representative," not only includes the executor or administrator of a deceased person, but also any one who has succeeded to the right of such deceased, whether by purchase or descent or operation of law.

ESTOPPEL IN PAIS, at common law, arose only in the case of those solemn and peculiar acts to which the law gave the power of creating a right, or passing an estate, and to which the law attached as much efficacy and importance as to matters appearing either by deed or of record. Mere acts, statements, or admissions of a party, when not made or performed under seal, of record, or in the course of some of those acts to which peculiar authority was attached by the law, were not considered as estoppels, and have no other weight than that of evidence.

PLEADING ESTOPPEL IN PAIS.—**EQUITABLE ESTOPPELS IN PAIS** are applied to prevent injury which would ensue to one from the acts or declarations of another were he permitted to gainsay the truth of such acts or declarations. It is invoked to prevent fraud; and in accordance with the rules of equity pleading, the party relying upon it must inform the adverse party of the nature of cause of action or defense which he will be obliged to meet. To do this, he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits of equity.

WHERE ESTOPPEL IN PAIS IS RELIED UPON AS DEFENSE, BUT NOT PROPERLY PLEADED, and evidence of the facts constituting it is introduced without objection, the defect in the pleading will be considered waived.

ESTOPPEL IN PAIS.—Whenever an act is done, or statement made by a party which cannot be contravened or contradicted without fraud on his part, and injury to others whose conduct, without fault on their part, has been influenced by the act or statement, the character of estoppel will attach to what would otherwise be mere matter of evidence. In all the cases in which the doctrine of equitable estoppel is applied, it will be found that it rests, for its foundation, upon the equitable principle that is ever invoked for the prevention of the mischievous consequences of fraud.

ESSENTIALS OF GOOD ESTOPPEL IN PAIS.—Where the declarations of the owner of land are relied upon to raise an estoppel *in pais*, preventing his asserting his title, it must appear that when he made the declarations he was apprised of the true state of his title; that he made the declarations with the intention to deceive, or such culpable negligence as amounts to constructive fraud; that the other party relied upon such declarations, and will be injured by allowing their truth to be disproved; and that such other party was not only destitute of all knowledge of the true state of the title, but also of all convenient or ready means of acquiring such knowledge.

NOT ESTOPPEL IN PAIS.—Where one who is ignorant of his title to a certain piece of land, and whose ignorance is not due to culpable negligence,

without an intention to deceive, tells one whom he knows to be about to purchase the land that he has no title thereto, whereby the latter is induced to purchase the land, and pay full value therefor, this does not create such an estoppel *in pais* as would prevent the first party, or a purchaser from him, from asserting his title thereto, upon its discovery.

WHERE ESTOPPEL IN PAIS IS SOUGHT TO BE ESTABLISHED by evidence of the declarations and admissions of persons made long anterior to the trial, this evidence cannot be too carefully scrutinized by the court or jury, as it is the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse.

INSTRUCTION THAT WHERE TWO INNOCENT PARTIES MUST SUFFER, that party who has been the cause of another's loss must lose, is properly refused.

INSTRUCTION THAT MAN CLAIMING TO OWN LAND IS BOUND TO KNOW STATE OF HIS OWN TITLE, is not in all cases correct, and is properly refused.

STATUTE OF LIMITATIONS. — An action to recover lands within the pueblo of San Francisco, by one holding title derived from the pueblo, may be brought at any time within five years after the issuance of a patent for the pueblo lands by the United States.

EJECTMENT to recover a lot of land in the city of San Francisco. The opinion states the case.

Patterson, Wallace, and Stow, for the appellant.

Hoge and Wilson, for the respondent.

By Court, CURREY, J. This is an action of ejectment brought to recover a certain fifty-vara lot of land in the city of San Francisco. The action was commenced by filing a complaint in the usual form, in July, 1863. The defendant by her answer controverted the material allegations of the complaint, and as an affirmative defense pleaded the statute of limitations, and also an estoppel *in pais*, arising from the conduct and declarations of the Hon. David C. Broderick, from whom the plaintiff claimed to derive his title to the demanded premises, of which it is alleged the plaintiff had notice by the defendant's actual possession of the lot at the time he purchased the property. By the answer it is alleged that on the 27th of August, 1853, one Henry Braddick was in possession of the lot, claiming the same as the owner thereof in fee-simple, who at that time sold and conveyed it to the defendant for seven hundred dollars; that while the defendant was negotiating with Braddick for the purchase of the lot, and before the bargain between them was consummated, Mr. Broderick, knowing that the defendant was about to purchase the lot of Braddick and pay him therefor, disclaimed having any title to the same, and represented to the defendant that she might safely purchase the premises of Braddick; that upon

the faith of such declaration and representation, she consummated the purchase, paid the consideration, which was the full value of the property, obtained a deed for it from Braddick, and entered into the possession of the same; and from that time held, occupied, and improved the lot, claiming it as the owner thereof adversely to Mr. Broderick, and all other persons claiming it by, through, or under him.

To maintain the issue on his part, the plaintiff produced and gave in evidence a grant of the lot in question, made in 1849, by the authority of the pueblo of San Francisco to David C. Broderick and Frederick D. Kohler; a conveyance from Kohler in 1852 of his interest in the lot to Broderick; a conveyance in October, 1858, from Broderick to John A. McGlynn; a conveyance in November, 1858, from McGlynn to Hugh P. Gallagher; and a conveyance in October, 1862, from Gallagher to the plaintiff. Mr. Broderick died on the 16th of September, 1859.

The defendant claimed title derived from Henry Braddick by deed, bearing date on the 27th of August, 1853, and produced and gave the same in evidence; and also produced witnesses who testified of and concerning the declarations and representations alleged to have been made by Mr. Broderick in his lifetime, which are set forth in the defendant's answer.

The defendant was also sworn as a witness on her own behalf; and her counsel then proposed and offered to prove by her the facts set up in the answer pleaded as an estoppel *in pais*; and also that she received a deed from the person in possession of the premises, viz.: Henry Braddick, on the 27th of August, 1853, and therefor paid him seven hundred dollars, and that she entered into possession of the lot at the time of her purchase, and during that year built a dwelling-house upon and a fence around it; that while in possession she graded the lot, and had since she purchased it been in the exclusive possession and occupation of the same.

The plaintiff objected that the defendant was incompetent as a witness to testify as to any matter of fact which occurred between her and Mr. Broderick in his lifetime. The court sustained the objection, and the defendant's counsel duly excepted.

The jury rendered a general verdict in favor of the plaintiff; and also a special verdict in response to special issues submitted to them. The result of the special verdict may be stated as follows:—

1. On the 27th of August, 1853, the defendant purchased of Henry Braddick the lot in controversy for the sum of seven hundred dollars, which she paid to him, and at the same time he executed to her a deed of conveyance for the same, bearing date on that day, when she entered into the possession of the lot, and from that time until the trial of this action has been in the exclusive possession of it.

2. Before the defendant received the deed from Braddick, and before she had paid him the consideration of seven hundred dollars for the premises, she informed Broderick that she wished to purchase the premises, when Broderick disclaimed having any claim or title thereto. He was then aware that she intended to purchase the lot of Braddick.

3. The defendant, relying upon this disclaimer of Broderick, purchased the lot, and paid seven hundred dollars for it, when she would not have done so if Broderick had not made such disclaimer.

4. When Mr. Broderick stated that he had no claim or title to the lot, he was not apprised of the true state of his own title, and in making such statement or representation to the defendant he did not intend to deceive or defraud her.

5. Mr. Broderick, in making this statement or representation, was not guilty of gross carelessness or culpable negligence.

6. The defendant was not, at the time she purchased of Braddick, wholly destitute of all knowledge of the true state of the title to the lot, nor of all means of acquiring such knowledge.

Each party moved for judgment. The court entered judgment for the plaintiff in accordance with the general verdict. The defendant applied to the court for a new trial, which application was denied. The appeal is from this order, and also from the judgment.

Several points are made on the part of the appellant on which she relies for a reversal of the judgment.

1. It is claimed on the part of the appellant that she was competent as a witness to testify on her own behalf as to declarations and statements made to her by Broderick, notwithstanding he had departed this life previous to the trial.

By section 392 of the practice act, in force at the time of the trial, parties as well as strangers in interest to the controversy were competent as witnesses, except as otherwise provided in that act.

The three hundred and ninety-third section of the act provides that no person shall be allowed to testify, under the provisions of the next previous section where the adverse party, or the party for whose immediate benefit the action or proceeding is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person.

The point here presented may not be particularly material in this case, inasmuch as the jury by their special verdict found the facts in every essentially important particular to be as the defendant sought to establish them by her own testimony. But, notwithstanding, the question is one of much practical importance in the administration of justice, and we deem it proper to dispose of it now that it is before us.

The import and effect of the word "representative" is the question to be determined in the disposition of the exception taken to the ruling of the court, sustaining the objection to the competency of the defendant as a witness in her own behalf. This statute is an innovation upon the rule of the common law, which refuses to permit any person, even under the sanction of an oath, who has an interest in the event of a suit, to give evidence in support of such interest. This rule of exclusion was founded on the known infirmities of human nature, which is often too weak to be restrained by religious or moral obligations, when tempted in a contrary direction by temporal interests: 1 Stark. Ev. 83. The law, as it stood before the enactment of statutes rendering parties to actions competent as witnesses, either for or against themselves, and the reasons existing as the foundation of the law, are not to be disregarded in the consideration of such statutes. The old and the new laws are to be compared *in pari materia*, if necessary, in order to ascertain the design of the law-making power, and the scope and objects of the statute to be construed.

In 1851, the rule of the common law on this subject was changed so far as to render competent as witnesses persons interested in the event of the action, other than parties or persons for whose immediate benefit the action might be prosecuted or defended: Practice Act of 1851, secs. 392, 393. By that act a party could examine the adverse party, who thereby became competent as a witness on his own behalf, if he elected so to do; but if he testified to new matter not responsive to the inquiries put to him by the party who called him, or not necessary to explain or qualify his answer thereto,

or to discharge, when his answer would charge himself, then his adversary might offer himself as a witness, on his own behalf, as to such new matter: *Id.*, secs. 418-421. In 1854 (Laws of 1854, p. 84), it was provided that "parties may be witnesses on their own behalf when the action is brought for the settlement of or in relation to the business and accounts of a copartnership then existing, or which had previously existed between them, to prove vouchers or items of an amount under one hundred dollars." In 1861 (Laws of 1861, p. 522), the act was so amended as to permit a party to an action to be examined as a witness in his own behalf, under certain limitations and regulations. One limitation was that "such examination shall not be had, nor shall any other person for whose immediate benefit the same is prosecuted or defended be so examined, unless the adverse party or person in interest is living, nor when the opposite party shall be the assignee, administrator, executor, or legal representative of a deceased person."

In 1863 (Laws of 1863, p. 70), the legislature again amended the act, making parties competent witnesses, except that "no person shall be allowed to testify . . . when the adverse party, or the party for whose immediate benefit the action is prosecuted or defended, is the representative of a deceased person, when the facts to be proved transpired before the death of such deceased person."

It is manifest from the legislation on the subject, that the policy of opening the door to the admission of parties as witnesses, to testify generally in their own cases, has been contemplated with no light degree of apprehension; and to guard against the mischiefs, and to secure the benefits arising from the change of the law, the legislature, in respect to it, provided as amply as practicable to place the parties on an equality.

By the act of 1861, the party who proposed to become a witness was required to give his adversary notice of the particular matters concerning which he intended to give evidence, that the adverse party might be prepared to meet it by his own testimony or that of other witnesses; and even with this protection against surprise, a party was not permitted to become a witness in his own behalf unless the adverse party was living, nor where he might be an assignee, administrator, executor, or legal representative of a deceased person. The change effected by the amendment of 1863 seems to have been intended to dispense with the necessity of the notice required under the law as it stood previously, and yet to retain in substance the

portion of it which disabled one party from testifying concerning matters of which the other, as the representative of a deceased person, could not be presumed to have any knowledge. In the act of 1861, the words "assignee, executor, administrator, or legal representative" are employed; while in the act of 1863, in the place of these, the word "representative" is the only term used; and it is insisted on the part of the appellant that this term is alone descriptive of the executor or administrator of a deceased person. If this construction of the amendment of 1863 be proper, it would seem that the words "legal representative," in the former act, were meaningless; for what is the difference between the terms "representative" and "legal representative," as used?

In *Grand Gulf R. R. & Banking Co. v. Bryan*, 8 Smedes & M. 275, Mr. Chief Justice Sharkie said: "In legal parlance, the executor or administrator is most commonly called the legal representative." And in the same case he denied that the terms "legal representative" were limited to this use alone, saying: "In regard to things real, the heir is also the legal representative, and so is the devisee, who takes by purchase"; and that "an assignee or grantee is a legal representative of the assignor or grantor in regard to the thing assigned or granted"; and he also said that "general expressions in law must be construed to have a general application, unless there be a clear indication that they were intended to be used in a restricted sense. Representative is one who exercises power derived from another. A purchaser derives his power over the estate from his vendor": *Phelps v. Smith*, 15 Ill. 574.

We are of opinion that the word "representative" in the amendment of 1863 was intended by the legislature to designate the executor or administrator of a deceased person, and also the person or party who had succeeded to the right of the deceased, whether by purchase or descent, or operation of law. Any other construction would leave the purchaser of an estate from a grantor, who subsequently died, in a worse condition than the grantor's executor would be, had no conveyance of the estate been made. There is no reason why the plaintiff in this case should be exposed to the interested testimony of the adverse party more than that the executor of the deceased grantor should be, had the property in controversy been a portion of the estate committed to his charge. We do not think the point one of serious doubt. If it were so, the construction we give to the word "representative" is reasonable and equitable, and therefore should be adopted.

2. The defendant claims that the special verdict is inconsistent with the general verdict, and that by the special verdict she was and is entitled to judgment; and the doctrines of the law of estoppel *in pais* are relied on as requiring a judgment for the defendant. On the part of the plaintiff it is maintained that neither the facts pleaded by the defendant nor the findings of the jury, as contained in their special verdict, authorize a judgment different from that given and entered in the case.

Estoppels *in pais* seem, in their common-law origin, to have arisen only in the case of those solemn and peculiar acts to which the law gave the power of creating a right, or passing an estate, and to which the law attached as much efficacy and importance as to matters appearing either by deed or of record. Mere acts, statements, or admissions of a party, when not made or performed under seal, of record, or in the course of some of those acts to which peculiar authority was attached by the law, were not considered as estoppels, and had no other weight than that of evidence, more or less strong, but which might be explained or rebutted.

By the rules of the common law an estoppel by deed or by matter of record must be specially pleaded, unless the circumstances be such as to prevent it from being placed on the record by a plea: *Young v. Raincock*, 7 Com. B. 310; *Howard v. Mitchell*, 14 Mass. 242; *Bartholomew v. Candee*, 14 Pick. 167. On the other hand, estoppels by matters *in pais*, of a nature of which courts of law would take cognizance, could be relied on in evidence as conclusive without being pleaded by way of estoppel: *Sanderson v. Collman*, 4 Man. & G. 209; *Darlington v. Pritchard*, 4 Id. 783.

But equitable estoppels *in pais*, generally, if not universally, are applied to prevent injury which would ensue to one from the acts or declarations of another, were he permitted to gainsay the truth of such acts and declarations. The principle is invoked and applied for the prevention of fraud, or that which is tantamount thereto, on the one side, and injury on the other; and it is but just, and is in accordance with the rules of pleading in equity cases, that the party relying upon an equitable estoppel *in pais* should inform the adverse party of the nature of the cause of action or defense which he will be obliged to meet. To do this, he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits of equity: *Brinckerhoff v. Lansing*, 4

Johns. Ch. 70 [8 Am. Dec. 538]; *Arguello v. Edinger*, 10 Cal. 150; *Lestrade v. Barth*, 19 Id. 660; *Downer v. Smith*, 24 Id. 114; *Blum v. Robertson*, 24 Id. 127; *Clarke v. Huber*, 25 Id. 593.

The answer does not show by averments that Broderick was, at the time of the conversation between him and the defendant, apprised of the true state of his own title, nor that he made the statements and representations imputed to him, and found by the jury, with the intention to deceive or defraud the defendant, or with such carelessness and culpable negligence as to amount to a constructive fraud; nor that the defendant was without knowledge of the true state of the title to the premises, or without the means of readily acquiring such knowledge, when she purchased of Braddick.

Some of these facts, at least, we deem material and essential to the creation of an equitable estoppel in this case; but as evidence was produced on the trial in the same manner as if these facts had been properly pleaded, and the jury have rendered a special verdict which negatives such facts, we shall consider the case upon the special verdict without regarding the objection made on behalf of plaintiff to the answer.

According to the modern decisions of the courts, both in England and in the states of the American Union, it is established that wherever an act is done or statement made by a party which cannot be contravened or contradicted without fraud on his part, and injury to others whose conduct, without fault on their part, has been influenced by the act or statement, the character of estoppel will attach to what would otherwise be mere matter of evidence.

In *Pickard v. Sears*, 6 Ad. & E. 447, Lord Denman, C. J., said: "Where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time." In order to create an equitable estoppel, there must be an admission intended to influence the conduct of the man with whom the party is dealing, and actually leading him into a line of conduct which would be prejudicial to his interest, unless the party estopped be cut off from the power of retraction. For the prevention of fraud, the law holds the admission to be conclusive: Cowen, J., in *Dezell v. Odell*, 3 Hill, 219 [38 Am. Dec. 628]. It was held in the same case by Mr. Justice Bronson

that to constitute an estoppel *in pais* against a party, there must be: 1. An admission which is clearly inconsistent with the evidence which the party proposes to give, or the title, or claim which he proposes to set up; 2. That the other party has acted upon such admission, and will be injured by allowing the truth of the admission to be disproved: *Dezell v. Odell*, 8 Hill, 221, 222 [38 Am. Dec. 628]; *Welland Canal Co. v. Hathaway*, 8 Wend. 483 [24 Am. Dec. 51].

It will be observed that in the decision of Lord Denman, to which we have referred, the word "willfully" is of potent import, and is made to characterize the act of the wrong-doer in effecting the injury done; and in all the cases in which the doctrine of equitable estoppel is applied, it will be found that it rests for its foundation upon the equitable principle that is ever invoked for the prevention of the mischievous consequences of fraud: *Copeland v. Copeland*, 28 Me. 539, 540; *Commonwealth v. Moltz*, 10 Pa. St. 531 [51 Am. Dec. 499]; *Adams's Eq.* 151.

In *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 367, 368, Mr. Chief Justice Field held that to the application of the principle of equitable estoppel, "with respect to the title of property, it must appear: 1. That the party making the admission by his declarations or conduct was apprised of the true state of his own title; 2. That he made the admission with the express intention to deceive, or with such carelessness or culpable negligence as to amount to constructive fraud; 3. That the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; 4. That he relied directly upon such admission, and will be injured by allowing its truth to be disproved." And he further said: "There must be some degree of turpitude in the conduct of a party before a court of equity will estop him from the assertion of his title." We are satisfied the learned judge who pronounced this opinion did not intend, by the language employed, to hold that a person must be destitute of all possible means of acquiring knowledge of the true state of the title, but rather of all convenient or ready means to such end; and with this construction we accept the doctrine declared in that case: *Whitaker v. Williams*, 20 Conn. 104; 1 Story's *Eq. Jur.*, sec. 391; *Carpentier v. Thirston*, 24 Cal. 268.

The doctrine of estoppel *in pais* should not be too readily extended, when the effect of it is to divest men of their estates in lands. It should be remembered that we have a statute

which makes a writing essential to the assignment or creation of an estate in real property, and that one of the objects of such statute was to render estates secure. In *Parker v. Barker*, 2 Met. 423, the supreme court of Massachusetts held that a parol stipulation made by one party, and acted on by the other, will not constitute an estoppel with reference to land, unless it be attended by actual fraud or concealment: *Clark v. Baker*, 5 Id. 461; and *Brewer v. Boston & W. R. R. Co.*, 5 Id. 478 [39 Am. Dec. 694].

In *Jackson v. Sherman*, 6 Johns. 21, it was held that parol declarations are inadmissible to prove or disprove a title; and in *Jackson v. Vosburgh*, 7 Id. 186 [6 Am. Dec. 276], that like evidence of a disclaimer of title is inadmissible. This rule cannot be too closely adhered to, and a departure from it can only be justified when necessary to prevent frauds, against which the injured party could not guard by the exercise of proper diligence. By the special verdict, it is found that the defendant was not destitute of all knowledge of the true state of the title. If she had any knowledge respecting it, she cannot justly complain, if by her indifference to the ordinary means of information, she failed to become fully informed of the true state of the title. *Vigilantibus non dormientibus jura subveniunt*, is an ancient maxim of the law, and forms an insuperable barrier against the claim of an improvident purchaser, and especially so when such claim is made against one who is a stranger to the contract between the vendor and vendee: 2 Kent's Com. 285; 1 Sugden on Vendors and Purchasers, 2; *Ferris v. Coover*, 10 Cal. 632.

The case of *Storrs v. Barker*, 6 Johns. Ch. 166 [10 Am. Dec. 316], on which the defendant places reliance, does not, in our judgment, at all militate against the doctrine maintained by the decisions which we have cited, but may be cited in their support. In that case it was held that one knowing certain facts, which had the effect to create a title in himself to property, though not aware of such effect, if active in inducing one who, to all appearances had a title to it, to sell and another to purchase it, should not be permitted afterward to allege his ignorance of the law in attempting to recover the property of the purchaser. In the case here referred to, both parties claimed from the same source,—the one through a devise made by a *feme covert*, which was void, and the other as her heir at law. The heir at law recognized for years the devise as valid, and as passing the estate to the devisee; and while

the devisee and the purchaser were negotiating in respect to the matter, which lasted through several weeks, he repeatedly advised the one to sell and the other to buy, declaring that he considered the title under the will good (pp. 167, 172); and for three years thereafter permitted the purchaser to make improvements and exercise acts of ownership upon the land without interposing any claim as the heir at law, founded on the invalidity of the devise. Chancellor Kent, after referring to these circumstances, said: "If the case rested upon these facts alone, it would fall within the rule of equity, that when one having title acquiesces knowingly and freely in the disposition of his property for a valuable consideration by a person pretending to title, and having color of title, he shall be bound by that disposition of the property; and especially if he encourages the parties to deal with each other in such sale and purchase. It is rarely that a mistake in point of law, with full knowledge of all the facts, can afford ground for relief or be considered as a sufficient indemnity against the injurious consequences of a deception practiced upon mankind; and if the person, as in this case, is not merely silent and passive, but gives explicit confirmation to the title of the party in possession, and encourages him to sell, and encourages the purchaser to buy, the case is greatly altered, and equity and policy equally dictate that he and not the purchaser ought to suffer. His ignorance of the law ought not to protect him from the rule of equity. . . . If he may be allowed to plead his voluntary ignorance in destruction of equitable rights, growing out of his own acts and assertions, the grossest impositions and the greatest fraud might be practiced with impunity."

The statement which the jury have found that Broderick made, to the effect that he had no claim to the lot, was a mistake of fact which the jury, upon all the evidence before them, say was not made with any intent to deceive or defraud the defendant, nor with gross carelessness or culpable negligence; and we think it would be carrying the doctrine of estoppel *in pais* to an extent that would encourage the grossest frauds and perjuries, and would result in many instances in divesting the owner of his title and transferring it to another, upon evidence of declarations unwittingly and innocently made, were we to hold that the facts found by the jury create an estoppel against the plaintiff's assertion of his title to the demanded premises.

We may say in respect to parol evidence of the declarations

and admissions of persons made long anterior to the trial, upon which an estoppel *in pais* may be sought to be founded, that it cannot be too carefully scrutinized by courts and juries. In all cases, it is the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse. In most cases, it is impossible, however honest the witness may be, for him to give the exact words in which the declaration or admission was made. Sometimes even the transposition of the words of a party may give a meaning entirely different from that which was intended to be conveyed. The slightest mistake or failure of recollection may totally alter the effect of the declaration or admission. And more than this, it is most unsatisfactory evidence on account of the facility with which it may be fabricated, and the impossibility, generally, of contradicting it when false: *Law v. Merriis*, 6 Wend. 277; *Jackson v. Sherman*, 6 Johns. 21; *Lench v. Lench*, 10 Ves. 517; *Cleveland v. Burton*, 11 Vt. 139; *Snelling v. Utterback*, 1 Bibb, 611 [4 Am. Dec. 661]; *Morris v. Morris*, 2 Id. 311; *Barnard v. Flourney*, 4 J. J. Marsh. 102; *Perry v. Gerbeau*, 5 Martin, N. S., 18.

3. The defendant requested the court to give certain instructions to the jury, which were refused, and now assigns this action of the court as erroneous.

The first requested instruction was, "that where two innocent parties must suffer, that party who had been the cause of another's loss must lose."

In *Lickbarrow v. Mason*, 2 Term Rep. 70, Mr. Justice Ashurst said: "Wherever one of two innocent persons must suffer by the act of a third, he who enabled such third person to occasion the loss must bear it." But great caution should be exercised in applying this principle, and the court should be satisfied that the case is one calling for its application, before the question is submitted to the jury, as to which of the parties is entirely *in delicto*. The instruction requested is ambiguous if not entirely unintelligible. It does not inculcate the doctrine enunciated by Mr. Justice Ashurst. In legal contemplation the person who causes a loss to another is not innocent; and it would have been improper for the court to have charged the jury that, both parties being innocent, one of them could be found guilty of a wrong to the other.

The second requested instruction was, "that the grant made by Geary to Broderick and Kohler was not recorded in August, 1853, so as to impart notice to defendant."

If the fact of constructive notice to the defendant of the existence of this grant had any bearing on the case, the ruling of the court refusing this charge is justified by the case of *Touchard v. Keyes*, 21 Cal. 202, and the statutes referred to therein.

The third requested instruction—"that, as the loss stood, and was construed by the supreme court of California in August, 1853, and prior thereto, D. C. Broderick had no title to lot 1,090"—was irrelevant to any question before the jury, and the court was right in refusing the request.

The fourth requested instruction—"that a man claiming to own land was bound to know the state of his own title"—was properly refused, because such is not, in all cases, the law. The case of *Storrs v. Barker*, 6 Johns. Ch. 166 [10 Am. Dec. 316], cited in support of the doctrine of the instruction, goes no further than to hold that the presumption is, that every one is acquainted with his own rights, provided he has had reasonable opportunity to know them.

The exceptions taken to the general charge of the court have already been disposed of in the consideration of the several questions examined, and it is unnecessary to notice them in detail.

4. The last point made on the part of the defendant is, that the plaintiff's cause of action was barred by the statute of limitations.

The transcript of the record contains this statement: "Proceedings for confirmation of pueblo title considered in evidence, by which it appeared that the city of San Francisco had, under the act of Congress on that subject, petitioned the United States board of land commissioners, in the year 1853, by petition in due form for a confirmation of the pueblo land, claiming the same under grant and the laws and proceedings of the Mexican government, and which land embraced the land in controversy in this action, and that said claim is now, on due proceedings, prosecuted on appeal pending and yet undetermined in the district court of the United States for the northern district of California, and that no final confirmation has yet been made therein."

By the sixth section of the statute of limitations (Wood's Digest, 46), an action may be maintained by a party claiming real estate, or the possession thereof, under title derived from the Spanish or Mexican governments, or the authorities thereof, if such action be commenced within five years from the time

of the final confirmation of such title by the government of the United States, or its legally constituted authorities.

In *Johnson v. Van Dyck*, 20 Cal. 228, the court held that the "final confirmation," to which the act of Congress of 1851 refers, is the final adjudication of the tribunals of the United States upon the validity of the title of the claimant under the Mexican grant; that until the survey which follows such adjudication is made and approved, the title is not definitively confirmed to any particular premises; that the confirmation to which the act of this state refers is the definitive confirmation; and that the statute of limitations begins to run only from the time the patent may be issued: *Richardson v. Williamson*, 24 Cal. 289.

Thus the statute and the authorities cited and referred to settle this point.

We have noticed every question presented on the part of the appellant, and the conclusion to which we have arrived is, that there is no cause for disturbing the judgment rendered.

Judgment affirmed.

DOCTRINE OF ESTOPPEL IN PAIS will be found much discussed in the American Decisions. The rules laid down in the principal case in relation thereto will be found supported by and illustrated in the following cases: *Titus v. Morse*, 63 Am. Dec. 665; *McAfferty v. Conovers*, 70 Id. 57; *Beaupland v. McKee*, 70 Id. 115; *Mitchell v. Reed*, 70 Id. 647; *Woods v. Kirk*, 61 Id. 614; *Bryan v. Ramirez*, 68 Id. 340; *Thrall v. Lathrop*, 73 Id. 306; *Saunderson v. Ballance*, 67 Id. 218; *Drew v. Kimball*, 80 Id. 163; *Caldwell v. Auger*, 77 Id. 515, and the notes to these cases.

PLEADING FACTS CONSTITUTING ESTOPPEL IN PAIS: See *Caldwell v. Auger*, 77 Am. Dec. 515, and note.

WHERE ONE OF SEVERAL INNOCENT PARTIES MUST SUFFER, the loss should fall on the one by whom it was occasioned. For a case in which this rule was applied, see *Titus v. Morse*, 63 Am. Dec. 665.

THE PRINCIPAL CASE IS CITED, and the doctrine of equitable estoppels and estoppels *in pais* discussed at length, with conclusions similar to those arrived at therein, in *Bowman v. Cudworth*, 31 Cal. 148-153; *Wilson v. Castro*, 31 Id. 420-439; *Love v. Shorter*, 31 Id. 487-494; *Maine Boys T. Co. v. Boston T. Co.*, 37 Id. 40-50; *Martin v. Zellerbach*, 38 Id. 300-315; *Flege v. Garvey*, 47 Id. 377; *Hays v. Livingston*, 34 Mich. 393; *Henshaw v. Bissell*, 18 Wall. 271; *Wythe v. Smith*, 4 Saw. 26; *Smith v. Penny*, 44 Cal. 166; *Ries v. Lawrence*, 63 Id. 142; *Sweeney v. Collins*, 40 Iowa, 543; *Brant v. Virginia C. & I. Co.*, 93 U. S. 336. The principal case is also cited, and the competency of witnesses under the statute relating to "representatives of a deceased person," and who are included therein, discussed in *Kisting v. Shaw*, 33 Cal. 425-446; and *Batteries v. Bliss*, 36 Id. 489-512; who are representatives: See *Wamsley v. Crank*, 3 Neb. 350; *Marquart v. Bradford*, 43 Cal. 529; *King v. Hancy*, 46 Id. 562. It is again cited to the point that the statute of limitations does not

begin to run against lands included in Mexican grants until after they have been confirmed, and a patent issued, in *Hills v. Sherwood*, 33 Cal. 474-479; and *Sabicht v. Aguilar*, 43 Id. 291-294; *Younger v. Paglee*, 60 Id. 521; *O'Connor v. Fogle*, 63 Id. 11.

GALLAND v. JACKMAN.

[26 CALIFORNIA, 79.]

ALTERATION OF INSTRUMENTS.—Plaintiff who produces in evidence a deed as a muniment of his title, which appears upon its face to have been altered in a particular material to his interests and to the prejudice of the defendant, must establish by satisfactory evidence that the alteration was made at the time the instrument was executed, or it will be given effect to as it read before the alteration was made.

RECITAL OF CONSIDERATION NOT CONCLUSIVE.—Recital of payment of valuable consideration in a deed to plaintiff who claims as innocent purchaser without notice of a prior deed to defendant, does not prove such consideration as between plaintiff and defendant. Such recitals are not evidence against strangers, nor against one claiming under the party executing the reciting deed by title prior thereto, or adversely to him, but only against those claiming under him by title subsequent.

AFTER GRANTOR HAS ONCE PARTED WITH ALL HIS INTEREST IN LAND TO ONE, BY DEED, he can make no admission by deed or otherwise that would be binding on his first grantees.

NOTICE OF PRIOR UNRECORDED DEED.—When a subsequent purchaser whose deed is recorded had notice at the time of his purchase of some kind of a prior conveyance from his grantor, even if he did not know what kind of a conveyance it was, whether of an estate for years or in fee-simple, he cannot claim as an innocent purchaser.

THE opinion states the case.

Rhodes and Cadwalader, for the appellant.

Long, Edwards, and Hereford and Williams, for the respondents.

By Court, CURREY, J. This action was brought to recover the possession of the second story of a brick-house in the town of Tehama, in the county of Tehama and was tried by the court without a jury. Both parties claimed the demanded premises from one J. M. Betts, as the common source of title. The facts as they are found by the court are in substance as follows, viz.: J. M. Betts was the owner of a lot of land in the town of Tehama, and sold a portion of it to S. H. Depuy. By mistake the whole lot was described in the deed of conveyance instead of only the portion intended to be conveyed. This deed was recorded. Depuy and Betts then entered into a contract, by which Depuy undertook to erect, upon the land sold and intended to be conveyed to him, a hotel, and upon the

other portion of the lot a store. By this contract, Depuy was to have the second story of the store building, to be used as a part of the hotel. The contract was performed by Depuy. The hotel proper and the store were divided by a party-wall, the center of which was understood to be the dividing line between the store and hotel. The entrance to the second story of the store was through the hotel.

After the store had been erected, and the hotel was in process of erection, the mistake in the conveyance was discovered. Depuy then conveyed by deed to Betts the land on which the store had been erected, making the center of the division wall between the store and hotel the line of boundary between the two parcels of land, and Betts, in pursuance and fulfillment of his contract with Depuy, conveyed by deed to Depuy the second story of the store. This deed bears date November 27, 1859, and it was first recorded in April, 1862. The deed from Depuy to Betts was originally dated the "twenty-seventh" day of November, 1859, but it appeared at the trial that the word "seventh" had been partially erased, and the word "eight" written-over it, followed by the figures "28" inclosed in a parenthesis. This deed was acknowledged on the third day of December following, and was recorded on the 8th of the same month. As recorded, the date of the deed appeared to be of the 28th of November. After the hotel was completed, Depuy leased it, except for about a month he occupied it himself, and from that time until the trial it was used as a hotel. The defendant was occupying it when this action was commenced. On the 1st of February, 1862, Betts conveyed by deed to the plaintiffs the land upon which the store was erected, with the appurtenances. In this connection, the court finds that the plaintiffs had knowledge that Betts executed a conveyance of some kind to Depuy for the second story of the store, and it is also stated to be clear from the evidence that the two deeds of November, 1859, were extended as a matter of fact to be but one transaction; that is to say, that Depuy should reconvey to Betts that portion of the land which he had conveyed by mistake to Depuy, and Betts should convey to Depuy the second story of the store in pursuance of his contract to do so.

The statement in the case shows that the plaintiffs' deed was recorded on the 10th of February, 1862, and the deed to Depuy, under which the defendant claimed, was recorded on the 14th of April of the same year.

Before judgment was entered, the defendant moved for judgment in his favor, on the finding of facts, but the court refused to grant the motion, and gave judgment for the plaintiffs, and from this judgment this appeal is taken.

The plaintiffs based their rights to recover: 1. On the ground that they had the only title to the demanded premises, for the reason that the defendant's lessor conveyed the same to Betts, the grantor of the plaintiffs, by the deed of November, 1859, which they contended was executed and delivered on the 28th of that month; and 2. That if that deed was executed and delivered on the 27th of November, and the defendant's lessor, Depuy, thereby acquired title to the premises in controversy, it was void as against the plaintiffs, who claim they were subsequent purchasers in good faith and for a valuable consideration, from the common grantor of the same land, and that the conveyance to them was first duly recorded.

The defendant, on his part, claims that the two conveyances executed in November, 1859, were part and parcel of the same transaction, and that by the deed from Betts to Depuy the latter acquired the title of the former to the demanded premises, and that such title is still subsisting and paramount.

1. The court finds that the two deeds were intended by the parties to be but one transaction, and we are satisfied that this finding was justified by the facts disclosed. The deed from Depuy to Betts seems to have been dated originally on the 27th of November, which was the date of the deed from Betts to Depuy. Whether these deeds were dated on the same day is a matter of some importance, as disclosing the intention of the parties *therein*. The date of the deed from Depuy to Betts appears to have been changed to one day subsequent to its original date, but by whom or when does not appear. This deed was a muniment of the plaintiffs' title, and they must be presumed to have been aware of what appeared upon its face when they purchased of Betts, and we think this presumption must be regarded as conclusive. They produced it in evidence bearing the appearance upon its face of having been altered in a particular material to their interest, and to the prejudice of the defendant. It was therefore incumbent on them to establish by satisfactory evidence that the alteration was made by the grantor, or by his authority, before the date could properly be deemed as of the 28th instead of the 27th of the month: 1 Greenl. Ev., sec. 564; Practice Act, sec.

448. If the execution of the deed by Betts was on the 27th, and that executed by Depuy was on the 28th of the month, and could be deemed transactions distinct and independent of each other, what motive had Betts to execute the deed of the 27th? He had long before then conveyed to Depuy, by mistake it is true, the portion of the lot on which the store was erected. Why should he perform the idle ceremony of executing a deed of the second story of the store to Depuy when in fact Depuy owned it at the time? This circumstance is one of persuasive force in ascertaining the intention of the parties, and a strong argument in support of the date of the deed as originally written. We are therefore led to the conclusion that by this deed of conveyance Depuy acquired the title and interest therein described.

2. Assuming that Depuy owned the second story of the store, and that he or his tenant under him had the right to its enjoyment at the time of plaintiffs' purchase, it remains to inquire whether the facts found authorize the conclusion that the plaintiffs stand in the position of subsequent purchasers in good faith for a valuable consideration, and that by force of the statute the deed of Depuy must be regarded void as against the plaintiffs as such purchasers: Laws of 1850, p. 252, sec. 26.

The court fails to find that the plaintiffs paid any valuable consideration for the premises described in their deed.

The recital in the deed from Betts to plaintiffs, of the receipt of a valuable consideration, does not prove it as between the plaintiffs and defendant. Such recitals are not evidence against strangers, nor against one claiming under the party executing the reciting deed by title prior thereto or adversely to him, but only against those claiming under him by title subsequent: *Long v. Dollarhide*, 24 Cal. 218.

The admissibility of a recital depends upon the same principle as the admissibility of a declaration of the person executing the reciting deed. Hence in general, in order to determine whether a recital is evidence in a given case against a party, it is only necessary to ascertain whether an acknowledgment or confession of the person who executed the deed would be competent.

In *Jackson v. McChesney*, 7 Cow. 361 [17 Am. Dec. 521], Mr. Justice Sutherland, in an action of ejectment, held otherwise, saying that the acknowledgment in a deed of the receipt of the consideration is *prima facie* evidence of its payment until im-

peached, and that its operation is not confined to the immediate parties to the deed, but extends to any person who may seek collaterally to impeach it. But the rule, we may safely say, is otherwise in an action at law where the question is material, as well as in a suit in equity.

In *Nolen v. Gwyn*, 16 Ala. 725, the court held that this rule was the same in a court of law as in a court of equity. After a grantor has once parted with all his interest in land by deed to one, he can make no admission by deed or otherwise that would be binding on his first grantee, or those who claim under him: *Doe v. Reeves*, 10 Id. 137; *McCain v. Wood*, 4 Id. 264; *Branch Bank v. Kinsey*, 5 Id. 12; *Falkner v. Leith*, 15 Id. 9; *Rogers v. Hall*, 4 Watts, 359; *Kimball v. Fenner*, 12 N. H. 248; *Jewett v. Palmer*, 7 Johns. Ch. 65 [11 Am. Dec. 401]; *Storey v. Windsor*, 2 Atk. 680; *Colton v. Seavey*, 22 Cal. 496; Willard's Eq. Jur. 253.

It is found by the court that the plaintiffs knew that Betts executed a conveyance of some kind for the second story of the store to Depuy. This being so, they cannot justly claim that they stand protected by the statute, because their case does not come within its letter nor its spirit. It matters not that they did not know the kind of conveyance which Depuy had received from Betts,—whether it was for an estate for years or in fee-simple absolute.

In *Jackson v. Burgott*, 10 Johns. 460 [6 Am. Dec. 349], Mr. Chief Justice Kent said: "It may be assumed as a settled principle in the English law, that when a subsequent purchaser, whose deed is registered, had notice at the time of his purchase of a prior, unregistered deed, the prior deed shall have the preference, for the object of the register is to give notice to subsequent purchasers; and in the case stated, the object of the act is answered, and his purchase under such circumstances is a fraud. It is considered as done *mala fide*, by assisting the original vendor to defraud the prior vendee, and the courts will not suffer a statute made to prevent fraud to be a protection to fraud." Other authorities of like import might be cited in support of the same doctrine, but the principle on which it is founded is too reasonable and obvious to require for its support additional authorities.

The plaintiffs were not entitled to judgment upon the facts found by the court, and judgment ought to have been rendered for the defendant. As the case stands, we think the ends of

justice would be best subserved by allowing the parties to try the cause *de novo*.

The judgment is therefore reversed, and a new trial ordered.

PRESUMPTION IS AGAINST VALIDITY OF DEED which presents material interlineations on its face, but this is not a presumption *juris et de jure*; it yields to contrary proof, and even to concurrent circumstances which create a strong presumption that the interlineation was made before the execution and delivery of the deed: *Pipes v. Hardesty*, 61 Am. Dec. 202, and note. The burden is upon the party producing an instrument which appears to have been altered in a material particular, to show its legality: *Clark v. Eckstein*, 62 Id. 307; *Van Horn v. Bell*, 79 Id. 506. Alteration in a deed is presumed to have been made after its execution, and the burden of proof is upon the grantee, and those claiming under him, to show the fact to be otherwise: *Doe v. Jewell*, 45 Id. 371.

RECITAL OF PAYMENT OF PURCHASE-MONEY IN DEED is no evidence of the fact of its payment as against third persons. A party claiming as *bona fide* purchaser for valuable consideration, without notice of a trust, must affirmatively prove the payment of the consideration by other evidence than the receipt upon the deed: *Lloyd v. Lynch*, 70 Am. Dec. 137, and cases in note.

DECLARATIONS OF PARTY WILL NOT BE PERMITTED TO CONTRADICT HIS PRIOR DEED: *McDowell v. Goldsmith*, 61 Am. Dec. 305. Admissions or representations of vendor, made after other persons have acquired separate rights in the same subject-matter, cannot be received to disparage their title. The rights of the vendee, and those claiming under him, cannot be affected or impaired in this way: *Simpson v. Carleton*, 79 Id. 707. Vendor's declarations after conveyance of realty are inadmissible to defeat it: *Thompson v. Thompson*, 68 Id. 638. Declarations of one who has sold his interest in goods are inadmissible to defeat his purchaser's title: *Grant v. Lewis*, 80 Id. 785, and notes to above cases.

NOTICE OF DEFECT IN TITLE.—Whatever puts party on inquiry amounts to notice, provided knowledge of the requisite fact would be obtained by the exercise of ordinary diligence. But notice of the existence of a deed is not inferred from proof of general report in the neighborhood that the land had been sold, and the communication of such report to defendant, nor from an intimation from one not interested in the land that another title is outstanding, nor generally from information given by a person not interested in the property: *Wilson v. McCullough*, 62 Am. Dec. 347. Mere rumor or suspicion of defect in title to land, or an outstanding title in a third person, will not operate as constructive notice to a purchaser: *Parker v. Kane*, 65 Id. 283. Subsequent purchaser will be charged with notice of a prior unrecorded deed, if the exercise of ordinary prudence and caution would have led him to knowledge: *Morrison v. Kelly*, 74 Id. 169, and notes.

THE PRINCIPAL CASE IS CITED IN *Lawton v. Gordon*, 34 Cal. 33, to the point that one cannot claim to be a subsequent purchaser in good faith, unless they took without notice of a prior conveyance. "There is no averment in the complaint that plaintiffs or their grantors had no notice of the conveyance from Barron to Reed. This is an essential averment; for without such averment it does not appear that they are *bona fide* purchasers": Id.

GODCHAUX v. MULFORD.

[26 CALIFORNIA, 316.]

STIPULATION BETWEEN ATTORNEYS FOR PLAINTIFF AND DEFENDANT THAT ANNEXED STATEMENT is a correct statement on motion for new trial, that upon it plaintiff's motion for a new trial was refused, also that it contains the judgment roll, orders and instructions given by the court, and shall be used on appeal without further certificate or identification, cures all technical objections to the transcript; and where no notice of motion for new trial appears, the court will presume that one was regularly given.

STATUTE OF FRAUDS—CHANGE OF POSSESSION.—When a case arises under the provisions of the statute of frauds, requiring an immediate delivery and an actual and continued change of possession upon a sale of goods, a question of fact is raised as to whether these requirements have been complied with, which must be determined like any other question of fact, by an inspection of all the circumstances of the case.

EMPLOYMENT OF VENDOR BY VENDEE—STATUTE OF FRAUDS.—Employment of vendor by the vendee in the subordinate capacity of clerk or salesman to take charge of the goods which were the subject of the sale, is not incompatible with an actual and continued change of possession within the meaning of the statute, and is not of itself conclusive evidence of fraud. It is not *per se* a fraud which admits of no explanation, but is a strong circumstance tending to show that there has not been such change of possession as the statute requires.

WHERE VENDEE OF GOODS EMPLOYS VENDOR THEREOF TO TAKE CHARGE OF THEM, the latter cannot be allowed to remain in the apparently sole and exclusive possession of the goods after sales, for that would be inconsistent with such an open and notorious delivery and change of possession as the statute contemplates. But if it is apparent to all the world that he has ceased to be the owner, and that another has acquired and openly occupied that position, the statute is satisfied.

WHERE VENDOR OF GOODS HAS BEEN EMPLOYED BY VENDEE THEREOF to take charge of them, it is competent for a creditor of the vendors to prove this fact as tending to show that there has been no actual and continued change of possession; but when proved, it does not become conclusive of that question, but is only an element of proof to be weighed by the jury.

CHATTEL MORTGAGES NOT WITHIN STATUTE OF FRAUDS.—Provision of statute of frauds prohibiting conveyances made in trust for the use of the person making the same, does not include chattel mortgages, but was intended to prevent a debtor from placing his property in the hands of a trustee having no beneficial interest therein, to hold for his benefit solely, and to enable him to receive and enjoy its income at pleasure, to the prejudice of his creditors.

CHATTEL MORTGAGE NOT WITHIN STATUTE OF FRAUDS.—Where an instrument is upon its face a chattel mortgage containing the usual defeasances, or where it contains no defeasance, but is in fact intended as a mortgage, there is, in the first place, an open, and in the second a secret, trust as to any surplus or excess; yet neither is within the statute of frauds. A trust as to surplus necessarily arises in the case of a mortgage growing out of the nature of the contract, but the trust is not the object of the

assignment. Its object is to give the mortgagee a lien as security for the payment of his debt, and other creditors are not in a legal sense hindered, delayed, or defrauded by the transaction.

DEFENDANTS recovered judgment in the lower court, and this is plaintiff's appeal therefrom. The opinion states the case.

Sloan and Provines, for the appellants.

Cadwalader, for the respondent.

By Court, SANDERSON, C. J. Previous to the submission of this case upon its merits, counsel for respondents moved the court to strike out the statement, on motion for a new trial, upon the following grounds: 1. Because no notice of plaintiffs' intention to move for a new trial was given; 2. Because the statement does not specifically set forth the grounds of the motion; 3. Because the statement is not such a statement as the practice act contemplates, either on appeal or on motion for new trial.

Whether any notice of motion for new trial was given, does not appear, and the statement is somewhat contradictory and inartificial; but there is appended to it a stipulation made between the attorneys who tried the case in the court below, which we think is a complete answer to all the substantial objections made to the record. The stipulation is signed by the attorneys of both parties, and is in the following words: "It is hereby stipulated by and between the attorneys for the plaintiffs and defendants in the above-entitled action, that the foregoing statement hereto annexed is a true and correct statement on motion for a new trial. That upon said statement the said court did, on the first day of September, 1863, overrule the plaintiffs' motion for a new trial, and refuse to grant the said plaintiffs a new trial in said action, to which ruling the said plaintiffs then and there excepted. And it is hereby further stipulated that the judgment roll, orders and instructions given and refused by the court, the aforesaid statement on motion for a new trial, and this stipulation, is a true and correct statement on appeal to the supreme court, and may be used as such without further certificate or identification."

In the presence of the foregoing stipulation, we will presume that notice of motion for a new trial was regularly given; and will further hold that all technical objections to the transcript are waived, and the case submitted to us upon its merits: *Weil v. Paul*, 22 Cal. 492.

The plaintiffs sue the defendant Mulford, late sheriff of

Calaveras County, and his sureties, for the alleged wrongful seizure and sale of certain goods belonging to them, under certain executions against one Kraft. The answer alleges that the goods so seized were the property of Kraft, and as such, legally subject to the seizure and sale.

It appears from the evidence set forth in the statement that for some time anterior to the 16th of December, 1857, Kraft had been engaged in selling goods and merchandise at Mokelumne Hill, in Calaveras County, where he also resided with his family, his dwelling-house being in the rear of the storeroom, toward the center of the lot. On that day he made a sale of his goods and merchandise to plaintiffs, and a lease of the storeroom. A bill of sale of the goods and a lease of the tenement were executed in writing by Kraft and wife, and delivered to plaintiffs at the same time. The validity of that sale seems to have been impeached on three different grounds:—

1. That it was made with the intent to hinder, delay, or defraud creditors, and therefore void under the provisions of section 20 of the statute concerning fraudulent conveyances.

2. That it was not accompanied by an immediate delivery, and followed by an actual and continued change of possession, as required by section 15 of the statute.

3. That it was made in trust for the use of the vendor, Kraft, contrary to the provisions of section 11.

Upon the close of the testimony both parties presented certain instructions which they respectively requested the court to give to the jury, some of which were given and others refused, the parties, respectively, duly excepting.

It appears, from the evidence set forth in the statement, that the negotiations for the sale of the goods were closed on the 16th of December, 1857, by the execution of a bill of sale and a lease of the storeroom. The door in the back end of the room leading to the dwelling-house of Kraft was immediately closed up by nailing planks across it. Kraft's sign was removed, and that of Godchaux and Brother put over the front door of the storeroom. A person by the name of Blum, who seems to have had no connection with Kraft in any way, was employed by plaintiffs to take immediate possession for them. He did so take possession, and retain it until one Block was sent up by them from San Francisco, who remained there until the goods were seized by the sheriff, in February, 1858. After the sale, Kraft was absent some three weeks in San Francisco, but at

the time of the levy by the sheriff, he, together with one of the plaintiffs and Block, was in the store, and was engaged arranging goods in a show-case.

It also appears from the testimony of Kraft, who was examined as a witness by the defendants, that there were certain conditions in the sale from him to plaintiffs not expressed in the bill of sale, to the effect that after twenty-four hours he was to go back to the store and sell the goods in the plaintiffs' firm name, and the plaintiffs were to keep the stock up by furnishing fresh goods; that he was to draw seventy dollars per month for family expenses, and eight dollars per month to pay interest on money owed by him; and that the remainder was to be sent to the plaintiffs at San Francisco; that the business was to be carried on for his benefit, and in the mean time the plaintiffs were to buy up all his debts at as low a figure as possible, and that after all the debts had been bought up, and the plaintiffs had received their advances, the stock was to be restored to him.

It is conceded by counsel for the plaintiffs, that the question as to a fraudulent intent between vendor and vendee, as matter of fact, under the provisions of section 20 of the statute of frauds, was fairly submitted to the jury by the instructions of the court upon that point; but it is insisted that the jury was not correctly instructed touching the law as found in the eleventh and fifteenth sections of the statute. The instructions which counsel claims are erroneous, are as follows:—

“If the jury believe from the evidence that Kraft was hired by the plaintiffs—Godchaux—and remained in possession of the goods he [Kraft] had sold to them as such hired man, the sale was void by the statute of frauds, and the jury will find a verdict for the defendants.

“If the jury believe from the evidence that the plaintiffs agreed with Kraft to return the balance of the goods, or the money which they brought, after paying themselves for the money due them, it raises a secret trust in favor of Kraft and the contract was void, and they will find a verdict for the defendants.

“Though the sale be absolute in terms, yet, if the jury believe from the evidence that it was made with the understanding between Kraft and plaintiffs that it was only to operate as a mortgage, then it is a secret trust as to the surplus, and is void as to the defendants, and the jury will find a verdict for the defendants.”

The first of the foregoing instructions was designed to apply to the facts in evidence the law as found in the fifteenth section of the statute of frauds: Wood's Digest, 107. That section reads as follows:—

“Every sale made by a vendor of goods and chattels, in his possession or under his control, and every assignment of goods and chattels, unless the same be accompanied by an immediate delivery and be followed by an actual and continued change of possession of things sold or assigned, shall be conclusive evidence of fraud as against the creditors of the vendor or the creditors of the person making such assignment, or subsequent purchasers in good faith.”

Whenever a case arises under the provisions of the foregoing section, the question of fact to be determined is, whether the evidence shows an immediate delivery and an actual and continued change of possession, as contradistinguished from a mere formal, or pretended and temporary one; and is to be determined, like any other question of fact, by an inspection of all the circumstances of the case. The instruction under consideration was doubtless framed in view of the construction given to the statute in *Fitzgerald v. Gorham*, 4 Cal. 290 [60 Am. Dec. 616], *Stewart v. Scannell*, 8 Id. 80, and *Bacon v. Scannell*, 9 Id. 271; but those cases were all substantially overruled by the case of *Stevens v. Irwin*, 15 Id. 503 [76 Am. Dec. 500], where, for the first time in this state, a true and rational exposition of the rule intended to be declared in the fifteenth section of our statute of frauds was given. In that case, after referring to the conflicting constructions by the courts of the English and American statutes of frauds, some holding that a retention of the goods by the vendor was *per se* fraud, and others that it was only *prima facie* evidence of fraud, the former being the rule adopted by the supreme court of the United States, Mr. Justice Baldwin, delivering the opinion of the court, said:—

“In this controversy as to what the true common-law rule is, the legislature wisely adopted, by statute, the construction given by the supreme court of the United States; for this course had, at least, the advantage of giving to the state one uniform rule in all courts on this important subject. But we apprehend that the legislature never intended, by this statute, to go beyond the extreme rule adopted by the supreme court of the United States, and the English cases on which that rule rests. There was no reason of policy for such extension;

indeed, such extension might defeat, in some degree, the reason for adopting the federal rule. The rule, as defined by our statute, is almost in the language of that given in the cases which establish the rule in England. It is true that some stress is laid on the words 'actual and continued change of possession,' but these words are suggested by the facts and principles of the decided cases referred to. The word 'actual' was designed to exclude the idea of a mere formal change of possession, and the word 'continued' to exclude the idea of a mere temporary change. But it never was the design of the statute to give such extension of meaning to this phrase, 'continued change of possession,' as to require, upon a penalty of a forfeiture of the goods, that the vendor should never have any control over or use of them. This construction, if made without exception, would lead to very unjust and very absurd results. A vendor could never become trustee of the goods without their being forfeited, or liable for his debts. If a livery-stable keeper hired a horse to the original vendor, it would be liable for his debts; or if a boarder came into a room, the furniture might be liable for his debts, if he once owned it. The 'continued change of possession,' then, does not mean a continuance for all time of this possession, or a perpetual exclusion of all use or control of the property by the original vendor. A reasonable construction must be given to this language, in analogy to the doctrines of the courts holding the general principles transcribed into the statute. The delivery must be made of the property; the vendee must take the actual possession; that possession must be open and unequivocal, carrying with it the usual marks and indications of ownership by the vendee. It must be such as to give evidence to the world of the claims of the new owner. He must, in other words, be in the usual relation to the property which owners of goods occupy to their property. This possession must be continuous, — not taken to be surrendered back again, — not formal, but substantial. But it need not necessarily continue indefinitely, when it is *bona fide* and openly taken, and is kept for such a length of time as to give general advertisement of the *status* of the property and the claim to it by the vendee."

Under the foregoing exposition of the statute (of the correctness of which we have no doubt), the instruction of the court in this case was undoubtedly erroneous, so far as it proceeds upon the theory that the employment of the vendor by the vendee, in the subordinate capacity of a clerk or salesman, is

absolutely incompatible with an actual and continued change of possession, within the meaning of the statute; and that such employment is, of itself, regardless of all the other facts and circumstances of the case, conclusive evidence of fraud. Such employment is undoubtedly a strong circumstance, tending to show that there has not been such an actual change as the statute requires, but it is not *per se* a fraud which admits of no explanation. As is well said by counsel for the plaintiffs: "A hired clerk or salesman is no more in the possession of the goods of his employer than a hired laborer is in possession of the farm on which he is employed at work." The employment of the vendor in a subordinate capacity is colorable only, and not conclusive upon the question as to whether there has been an immediate delivery and an actual change of the possession. He cannot be allowed to remain in the apparently sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual change as the statute exacts, in order to exclude from the transaction the idea of fraud. But if it be apparent to all the world that he has ceased to be the owner, and another has acquired and openly occupied that position; that he has ceased to be the principal in the charge and management of the concern, and become only a subordinate, or clerk,—the reason of the rule announced in the statute is satisfied. The immediate delivery, and actual and continued change of possession, are the ultimate facts by which, according as they are present or absent, the statute determines the legal character of the sale; but the instruction in question makes the bare employment of the vendor by the vendee in a subordinate capacity, regardless of the fact whether such subordinate capacity is open and notorious or not, the ultimate fact by which the statute determines the question of fraud; whereas it is only a probative fact to be taken into account in determining the ultimate facts mentioned in the statute, and by which the question of fraud is determined. It was competent for the defendants to prove the fact as tending to show that there had been no actual and continued change of possession; but when proved, it did not become conclusive of that question, as declared by the court below, but only an element of proof to be weighed by the jury. While our statute makes the want of an immediate delivery, and an actual and continued change of possession, conclusive evidence of fraud, it introduces no new rule as to what acts shall constitute such

delivery and change of possession. As the case went to the jury, they were only allowed to pass upon the question whether Kraft, the vendor, had been hired by the plaintiffs, and allowed to remain in possession (not exclusive) of the goods as clerk. Such, as we have seen, is not the question which the statute submits to their determination. By this instruction, the jury were precluded from finding as they might have done, in view of all the facts, that the delivery was immediate, and the change of possession actual and continued.

Speaking of a similar instruction, in *Warner v. Carlton*, 22 Ill. 424, the supreme court of Illinois said:—

“It is based upon the hypothesis that the vendee had no right to employ the vendor as a clerk to sell the goods in connection with others. There is no doubt that it is a circumstance to be considered on the question of fraud, but undoubtedly may be explained. It is not, *per se*, a fraud that admits of no explanation. If the vendor, after the sale, without a delivery of the goods, were to remain in the sole and exclusive possession, it would amount to a fraud in law; but such is not the evidence in this case. No evidence showed that Carlton was in the sole and exclusive possession, but it tended to show that he was only acting as a clerk, and that Telfer was the person having charge of the concern, and was the principal in its management. And for aught that appears, the evidence may have been conclusive of that fact. This instruction, without modification, so as to leave it to the jury to determine from the evidence whether he had remained in the exclusive possession and control of the goods, without having ever delivered them to the purchaser, was erroneous, and therefore properly refused.”

That the two remaining instructions above quoted are erroneous, does not admit of argument. If they declare the law correctly, no mortgages of personal property can be legally made in this state, which we apprehend is not the case, for where the instrument is upon its face a mortgage, containing the usual defeasance, there is an open trust as to any excess; and where it contains no defeasance, but is in fact intended as a mortgage, there is a secret trust as to such excess; yet neither is within the statute of frauds. These instructions were doubtless intended to declare the law as found in the eleventh section of the statute of frauds, which reads as follows:—

“All deeds of gift, all conveyances, and all transfers or as-

signments, verbal or written, of goods, chattels, or things in action, made in trust for the use of the person making the same, shall be void as against the creditors, existing or subsequent, of such person."

It is not the intention of the statute to prohibit chattel mortgages, but to prevent a debtor from placing his property in the hands of a trustee, having no beneficial interest therein, to hold for his benefit solely, and enable him to receive and enjoy its income at pleasure, to the prejudice of his creditors. The language of the statute is, "made in trust for the use of the person making the same." These words are not descriptive of a mortgage contract. A trust as to the surplus necessarily arises in the case of a mortgage growing out of the nature of the contract, but such trust is not the object, nor one of the objects of the assignment. Its object is to give the creditor a lien as security for the payment of his debt, and it does not convey to him the legal title subject to a trust in favor of the mortgagor. The other creditors are not in any legal sense hindered or delayed, or defrauded by the transaction. They may sue, notwithstanding, and reach the residuary interest of the mortgagor by attachment and execution, or by bill in equity, according to circumstances: *Leitch v. Hollister*, 4 N. Y. 216.

We think all three of the instructions were erroneous, for the reasons which we have briefly given.

Judgment reversed, and new trial ordered.

SAWYER, J., delivered a concurring opinion.

NOTICE. — NO PRESUMPTION THAT APPELLANT RECEIVED NOTICE of motion to vacate judgment arises, upon appeal from an order vacating a judgment, from the fact that the record is silent upon the subject: *Hettrick v. Wilson*, 80 Am. Dec. 337. Where the object of notice of appeal is accomplished it is immaterial whether there was notice or not: *McLeran v. Shartzer*, 63 Id. 84.

RETENTION OF POSSESSION OF GOODS BY VENDOR is presumptive evidence of fraud, and the burden of rebutting this presumption, and of showing by satisfactory evidence that there was really no intention to defraud, is cast upon the purchaser: *Grant v. Lewis*, 80 Am. Dec. 785. In Virginia, retention of possession of personal property by the vendor after an absolute sale is *prima facie* fraudulent, but the presumption may be rebutted by proof: *Born v. Shaw*, 72 Id. 633. But in Pennsylvania, retention of possession is fraud *per se*: *Id.*; and such appears to be the law in Kentucky: *Short v. Tinsley*, 71 Id. 482; *Jarvis v. Davis*, 61 Id. 166. The law upon this point will be found elaborated upon, and the question as to what is a sufficient delivery and change of possession to make a sale of chattels valid, in the different relations which persons may occupy towards each other, will be found discussed,

in *Garrett v. Rhame*, 67 Id. 557; *Stevens v. Irwin*, 76 Id. 500; *Grant v. Lewis*, 80 Id. 785, and in the notes to these cases.

CHATTEL MORTGAGE AUTHORIZING MORTGAGORS TO RETAIN POSSESSION of the property, and to use and enjoy the same according to the usual course of retail trade, is fraudulent and void as to subsequent creditors and purchasers while the mortgagors retain possession; but if the mortgagees take possession under the mortgage, before the rights of a judgment creditor have intervened, they are protected, although the mortgagors were continued in the store, under their old sign, and sold goods for the benefit of the mortgagees: *Reed v. Wilson*, 74 Am. Dec. 159. A chattel mortgage is not fraudulent *per se* and void, where it allows mortgagor to remain in possession, with the understanding that the business should go on as before under the control of the mortgagor; but the question of fraud should be submitted to the jury: *Googins v. Gilmore*, 74 Id. 472. Upon this question, see the very pointed decisions in *Place v. Langworthy*, 80 Id. 758; *Hempstead v. Johnston*, 65 Id. 458; *Bullitt v. Taylor*, 69 Id. 412; *Ford v. Williams*, 67 Id. 83; *Grimsley v. Hooker*, 67 Id. 227; *Wilson v. Russell*, 71 Id. 645, and the notes to these cases.

THE PRINCIPAL CASE IS CITED in *Woods v. Bugbey*, 29 Cal. 466, where it was said that the statute of this state makes a sale of personal property fraudulent and void as to creditors when there is not an actual and continued change of possession, and courts cannot evade its force and effect by an inquiry into the consideration paid by the purchaser, or the good faith of the transaction. The validity of a sale of personal property, fraudulent and void as to creditors, when tested upon the question of the delivery and continued change of possession, is to be determined by the same rule, whether the sale was absolute or made by way of mortgage to secure an indebtedness. It is cited in *Gray v. Sullivan*, 10 Nev. 424, to the point that the employment of the vendor in a subordinate capacity is only colorable, and not conclusive evidence of fraud,

CAPERTON v. SCHMIDT.

[26 CALIFORNIA, 479.]

JUDGMENT IN EJECTMENT CONCLUSIVE.—Judgment in an action to recover real estate in California is conclusive and final as to the parties and privies in such action upon all facts put in issue and determined therein, and concludes them in any subsequent action in which such facts arise.

PLEADING IN ACTION TO RECOVER REAL ESTATE.—In an action to recover real estate under the California law, no particular form of complaint is necessary; it is only required that it should be adapted to the estate sought to be recovered, and the facts desired to be put in issue. But the judgment is conclusive upon the facts put in issue and determined.

CONCLUSIVENESS AND ESTOPPEL OF JUDGMENT TO RECOVER POSSESSION OF REAL ESTATE IN CALIFORNIA IS LIMITED to the rights of the parties as they existed at the time when the verdict and judgment were rendered, and do not preclude either party from showing that their rights have been varied or extinguished at a subsequent period.

EJECTMENT. The opinion states the case.

Hawes, for the appellant.

Sloan, for the respondent.

By Court, SAWYER, J. The complaint in this action alleges, that on the first day of January, 1860, the plaintiff "was the owner in fee, and seised of, and in the possession of" block 142, in the city of Oakland, Alameda County; that afterwards, on the 20th of January, 1860, "whilst said plaintiff was so seised in fee and possessed of said tract of land, the said defendant wrongfully and unlawfully entered into and upon said premises and unlawfully ousted and ejected said plaintiff therefrom, and still continues to withhold wrongfully from said plaintiff the possession of said premises," and prays judgment for restitution of the premises, and for damages.

The answer specifically denies the allegations of ownership and seisin, and the ouster, thereby putting the title and ouster in issue. It then affirmatively alleges that on the 20th of December, 1858, in the district court of the third judicial district, the plaintiff and one John C. Hays, claiming the said lands as tenants in common, commenced a suit against said defendant for the recovery of the same premises, claiming the same and the possession thereof, as owners in fee-simple, the said defendant denying the ownership, title, and right of possession of said plaintiffs, and setting up and claiming title in himself as owner in fee-simple to the undivided forty eighty-first (40-81) parts of said premises; that the right and title of plaintiffs and of the defendant in said suit to the said premises so in controversy, and their respective rights and claim to the possession thereof, as owners or otherwise, were duly put in issue by the pleadings, and were fully litigated, tried, and finally determined in said suit; that after a full trial, it was finally adjudged by the court in said suit that the plaintiffs do have and recover the possession of the undivided forty-one eighty-first (41-81) parts of said premises, according to their undivided interests as tenants in common with the said defendant, and that the said defendant do have and recover against said plaintiffs the undivided forty eighty-first (40-81) parts of said land and premises, and for possession thereof as co-tenants with said plaintiffs; that the right, title, and claim to the said premises now set up by the said plaintiff, Caperton, are the same that were tried and determined in said suit; that the interest of said John C. Hays has been transferred to said Caperton since the final judgment aforesaid.

which judgment is still in full force; and that said Caperton has no right, title, or claim to said premises, or to the possession thereof, other than that which was tried and determined in manner aforesaid. The answer then insists that the said matter so adjudged ought not to be again brought in question; acknowledges the title of plaintiff to the forty-one eighty-first parts adjudged to said Caperton and Hays, and the right of the plaintiff as co-tenant to that extent to enter into possession with said defendant; and avers that he never withheld the possession thereof from said plaintiff. The answer also avers that defendant is owner in fee of the undivided forty eighty-first parts, of which he is lawfully in possession, and disclaims any interest, claim, or possession as to the rest.

The plaintiff on the trial relied upon a title derived from Luis Peralta, the original grantee of the Mexican government, through his sons Vicente and Domingo Peralta, to whom the grant was confirmed by the land commissioners, and the courts of the United States on appeal. Plaintiff also proved that defendant had been in possession since 1857.

The defendants, to maintain the issues on their part, offered in evidence the record of the former suit set up in the answer; to the introduction of which the plaintiff objected. The court sustained the objection, and defendant excepted. This ruling is assigned as error.

The complaint in the record offered in evidence, and excluded by the court, avers that "on the twenty-seventh day of September, 1858, the said plaintiffs [Caperton and Hays] were the owners in fee-simple and seised of, and as such entitled to the possession of," block 142, in the city of Oakland, Alameda County; that while so seised, and possessed, and entitled to the possession, the said defendant (Schmidt), on said day, "unlawfully, and without title or right, trespassed and entered upon said premises and took unlawful possession of the same, and he withholds and detains the same without right or title," etc., and prays judgment "for the restitution and recovery of said premises"; also for damages, etc.

The answer "denies that the said plaintiffs were, or are, owners in fee-simple, or seised of, or were, or are, entitled to the possession of the tract of land and premises mentioned in the complaint," etc.; denies that "he ever unlawfully, or without right or title, trespassed or entered upon said premises, or any part thereof, or took unlawful possession of the same, or dispossessed said plaintiffs," etc.

The defendant then sets up a claim to an undivided one half of the premises, averring that he is lawfully in possession of said undivided one half, and lawfully entitled to the possession thereof, in common with others, his co-tenants, to the extent of his interest and possession in common, as aforesaid, and avers that he has always confessed, and still freely confesses, the right of his co-tenants, lawfully possessed of an estate in said premises, to enjoy the same in common with himself.

Thus the title and right of possession were distinctly put in issue. The cause was tried by the court without a jury, and the court found and adjudged that the plaintiffs were entitled to forty-one eighty-first parts of the premises, "and that they be let into possession of the said premises according to their said undivided interests as tenants in common with the said defendants, and that said defendants do have and recover judgment against the said plaintiffs for the undivided forty eighty-first parts of said land and premises, and for the possession thereof as co-tenants with said plaintiffs, and that plaintiffs pay the costs of suit."

The record also contains an agreed statement on motion for new trial, embracing the evidence, which shows that the parties, on the former trial, relied upon the same title and same evidence to support it as on the trial in this case. But on the former trial the will of Peralta, offered in evidence by plaintiffs, was excluded, while on the trial in this case it was admitted. The plaintiffs in the first action appealed to the supreme court, the judgment was affirmed, and it is still in full force.

The former proceeding and judgment having been set up by way of estoppel, the question is, whether the record and judgment in the first action were admissible in evidence on the trial of the second.

It is perfectly well settled that the judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar; and where there has been no opportunity to plead it, and it is offered in evidence, it is admissible and conclusive between the same parties and their privies upon the same matter directly in issue in another court; and also when coming incidentally in question in another court for another purpose. The entire current of authorities in England and America establish the rule as here limited, and many extend it further: 1 Greenl. Ev., secs. 528-531; *Duchess of Kingston's Case*, 20 How. St. Tr.

355; *Landon v. Litchfield*, 11 Conn. 249; *Marsh v. Pier*, 4 Rawle, 289 [26 Am. Dec. 131]; *Smith v. Whiting*, 11 Mass. 446; *Stark. Ev.*, by Sharswood, 333; *Patter v. Baker*, 19 N. H. 167; *Betts Starr*, 5 Conn. 550 [13 Am. Dec. 94]; *Adams v. Barnes*, 17 Mass. 365; *Gardner v. Buckbee*, 3 Cow. 127 [15 Am. Dec. 256]; 2 *Smith's Lead. Cas.* 572; *Young v. Rummell*, 2 Hill, 481 [38 Am. Dec. 594]; *Lawrence v. Hunt*, 10 Wend. 85 [25 Am. Dec. 539]; 8 *Id.* 40.

And the rule is applicable to real as well as personal actions. "Each species of judgment, from one in an action of trespass to one upon a writ of right, is equally conclusive upon its subject-matter by way of bar to future litigation for the thing thereby decided. . . . 'What, therefore,' Lord Coke says, 'that in personal actions concerning debts, goods, and effects [by way of distinction from other actions], a recovery in one action is a bar to another, is not true of personal actions alone, but is equally and universally true as to all actions whatsoever *quoad* their subject-matter'" : *Outram v. Morewood*, 3 *East*, 357.

But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which only comes collaterally in question, though within the jurisdiction; nor of any matter incidentally cognizable; nor of any matter to be inferred by argument from the judgment. The matter to become as a plea, a bar, or as evidence, conclusive, must have been directly in issue: 1 *Greenl. Ev.*, sec. 528; *Fulton v. Hanlow*, 20 *Cal.* 451; *McDonald v. Bear River etc. Co.*, 15 *Id.* 147; *Hopkins v. Lee*, 6 *Wheat.* 109, and cases before cited.

It will be seen from the rule as here stated that the matter adjudicated to become, as a plea, a bar, or as evidence conclusive, must have been directly in issue, and not merely collaterally litigated. It must be a fact "immediately found according to the pleadings, not that on which the verdict was merely based,—a fact in issue, as distinct from a fact in controversy": *Patter v. Baker*, 19 *N. H.* 166; *McDonald v. B. R. W. & M. Co.*, 15 *Cal.* 148. And what constitutes a fact in issue, as distinct from a fact in controversy, is well illustrated in the case of *King v. Chase*, 15 *N. H.* 15-17 [41 *Am. Dec.* 675]; *Betts v. Starr*, 5 *Conn.* 552 [13 *Am. Dec.* 94].

The respondent's counsel does not controvert the correctness of these principles, but relies on them. He says: "It is not questioned on the part of the respondent that a judgment pronounced on the merits in one action by a court of competent

jurisdiction is conclusive upon the parties and privies in a subsequent action as to the same subject-matter. Nor does he contend that a judgment in ejectment forms an exception to the rule. . . . The object of ejectment for land is the recovery of possession; the subject-matter to be tried is the right of possession as between the plaintiff and defendant; that is the extent of the issue. On the trial of that issue various matters may arise collaterally; but the only fact directly put in issue, tried, and determined in the action, touches the right of possession. As to the matters so put in issue, tried, and determined, the judgment concludes the parties."

This proposition is partly but not entirely true. The recovery of possession was doubtless, in part at least, the object of a suit in the old action of ejectment,—the fruit sought by the litigation,—but the right of possession was not, strictly speaking, the fact litigated and determined. The subject-matter in one sense may be the right of possession; but the right of possession is a conclusion of law to be drawn from the facts put in issue and determined, and not the facts themselves from which it is deduced. A complaint alleging in terms a right of possession merely, and a wrongful withholding, would present no issue of fact which a court could try. The subject-matter litigated and determined depends upon the facts alleged in the pleadings.

This proposition of the respondent's counsel proceeds upon the theory that the recovery alone and not the matter in issue and determined, and upon which the recovery is had, constitutes the bar. Lord Ellenborough, in commenting upon a prior case, in *Outram v. Morewood*, 3 East, 354, 355, said:—

"The court very properly distinguished then between what operates by way of bar to a future recovery of the same thing, and what by way of estoppel. That was a case of a mere recovery *in ejectio firmæ*, without title alleged; and the plaintiff might, in respect of possession, or other varying circumstances of title, be well entitled to recover at one time, and not be so at another. And it is not the recovery, but the matter alleged by the party, and upon which the recovery proceeds, which creates the estoppel. The recovery itself in an action of trespass is only a bar to the future recovery of damages for the same injury; but the estoppel precludes parties and privies from contending to the contrary of that point or matter of fact, which having been once distinctly put in issue by them,

or by those to whom they are privy in estate or law, has been on such issue joined and solemnly found against them."

This shows that it is not the object of the suit, the recovery, or fruits of the litigation alone, that constitutes the estoppel, but the facts put in issue, and found, upon which the recovery is based. The controversy, then, is as to what is directly in issue in an action to recover the possession of real estate under our system of pleading and practice.

From habit, and as a matter of convenience, we ordinarily speak of the action, in a general sense, as an action of ejectment. This is well enough, so long as we do not suffer ourselves to be misled by confounding the action to recover real estate in use in this state with the action of ejectment at common law, and as a consequence embarrass ourselves by attempting to apply the rules of law peculiar to the latter action to the former. Technically and substantially, we have no action of ejectment. The forms constitute the substance of that action at common law. True, practically, the possession of the land was recovered. But this was equally true of the writ of entry, and an assize. All these were possessory actions merely. And there would be just as much propriety in calling our action to recover the possession of land a writ of entry, or an assize, as an ejectment. The pleadings are more nearly assimilated to the pleadings in a writ of entry, or an assize, than to the pleadings in an action of ejectment. In theory, the writ of entry and the assize were actions to recover the freehold, while ejectment was an action to recover the term of the tenant,—a mere chattel interest. But in our state, an action is rarely brought by a tenant, either in substance or form, to recover his term. Practically, the possession of the land, and nothing more, was recovered at common law in each of the actions named.

In regard to the two former actions, Mr. Blackstone says: "These remedies are either by writ of entry or an assize, which are actions merely possessory, serving only to regain that possession, whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims; they decide nothing with respect to the right of property; only restoring the demandant to that situation in which he was (or by law ought to have been) before the dispossession committed. . . .

"The first of these remedies is by writ of entry, which is

that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continues in possession."

The writ requires the tenant to deliver seisin, or show cause why he will not. "This cause may be either a denial of the fact of having entered by or under such means as are suggested, or a justification of his entry by reason of title in himself, or in those under whom he may claim; whereupon the possession of the land is awarded to him who produces the clearest right to possess it": Sharswood's Bla. Com. 180, 181.

After stating the exceptions, Blackstone says: "But in general the writ of entry is the universal remedy to recover possession, when wrongfully withheld from the owner": Sharswood's Bla. Com. 183. Notwithstanding these actions are merely possessory, and "decide nothing with respect to the right of property" (a question which could only be determined in a writ of right), a judgment in one writ of entry was conclusive in another, or in an assize for the same land.

Says Mr. Blackstone: "As a writ of entry is a real action which disproves the title of the tenant by showing the unlawful commencement of his possession, so an assize is a real action which proves the title of the demandant merely by showing his or his ancestors' possession; and these two remedies are, in all other respects, so totally alike that a judgment or recovery in one is a bar against the other; so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them:" Sharswood's Bla. Com. 184; see also *Adams v. Barnes*, 17 Mass. 365.

"Actions of ejectment have succeeded to those real actions called possessory actions; but an inconvenience was found to result from them which did not follow from real actions, to which it has been found necessary to apply a remedy. Real actions could not be brought twice for the same thing; but a person might bring as many ejectments as he pleased, which rendered the rights of parties subject to endless litigation": Archbold's note to Sharswood's Bla. Com. 206.

The inconclusiveness of the judgment resulting from the form of proceeding was admitted to be an inconvenience, and the necessary remedy for it, referred to by Mr. Archbold, was an injunction, which was at length granted, after two or more trials: Archbold's note to Sharswood's Bla. Com. 206. In these real actions, then, we may say, with at least as much propriety

as the respondent's counsel says of the action of ejectment, "the object is the recovery of possession; the subject-matter to be tried is the right of possession as between plaintiff and defendant; that is the extent of the issue."

It is manifest, therefore, that the reason that one recovery in ejectment at common law was not a bar to a second ejectment between the same parties for the same land, was not because the subject-matter to be tried was the right of present possession; for this reason would apply with equal force to the actions we have just considered, in which a former recovery was a bar. But the reason is found in the very framework and essential qualities of the action, which rendered the rules of law laid down at the commencement of this opinion inapplicable. The character of the proceeding is well known. Originally, the party who desired to recover the possession of land in this action entered upon the land, and there executed a lease to some friend, and left him in actual possession, where he remained till some other friend (called the casual ejector), or the prior tenant, came and turned him out. For this injury the tenant brought his action against the party who ousted him. If the party ousting him was a stranger, he was bound, under a rule of court, to give notice to the tenant in possession that he had been sued and should make no defense; and that unless the tenant in possession should defend he would be turned out. This served as process to the tenant in possession, who then appeared and defended by permission of the court, and became the real defendant in the suit. The plaintiff did not allege title in his declaration. He simply alleged that his lessor on a day named demised to him the premises in question, to hold for a specified term then next ensuing; that by virtue of said demise he entered into said premises and became and was thereof possessed for the said term; that being so possessed, the defendant, at a time specified, and before the expiration of his term, with force and arms entered and ejected him. Subsequently, a change was made by the courts, after which the plaintiff and casual ejector were fictitious persons. The tenant in possession, as a condition of being allowed to appear and defend, was required to enter into what was called the consent rule, whereby he agreed to confess the lease, entry, and ouster, and to plead not guilty. This obviated the necessity of proof on the points admitted, and left the parties at the trial at that stage of the proceedings in which they would have been after proving lease, entry, and ouster. But the

form of the declaration continued to be the same. Upon proof of the facts alleged, as the action originally stood, or upon their admission under the modified forms of proceeding, without proving any title in the landlord, if the defendant should introduce no testimony whatever, the plaintiff would probably be entitled to recover. He certainly would upon the face of the record, whatever the practice might have been under the almost unlimited control exercised over the action by the judge who introduced it, and his successors; and he certainly would at this day in this state, on such a complaint and proof of the facts alleged, with no counter proof. But it would not be safe for the plaintiff to rest on such proof or admissions, for the defendant would undoubtedly introduce testimony to rebut his *prima facie* case; hence it was necessary for the plaintiff to show title in his lessor, notwithstanding none was directly alleged; and the title, though not directly in issue, thus became the real question and the only question litigated. But as there was no averment of title, and no issue directly taken upon it, the title was only collaterally or incidentally litigated. It became "a fact in controversy," as distinct from "a fact in issue." Mr. Blackstone, after stating the mode of proceeding, says: "This is the regular method of bringing an action of ejectment, in which the title of the lessor comes collaterally and incidentally before the court in order to show the injury done to the lessee by this ouster": Sharswood's Bla. Com. 202; and again, 205: "Such is the modern way of obliquely bringing in question the title to lands and tenements, in order to try it in this collateral manner." But we have seen that the rule in all cases requires that the matter tried must be directly and not merely collaterally in issue, in order that the judgment shall be a bar, and in an action of ejectment at common law the title is not directly in issue; hence the judgment under the rule was not a bar, nor could the determination of the title be used as a matter of estoppel.

"In ejectment, the unsuccessful party may retry the same question [that is, the title] as often as he pleases, without leave of the court, for by making a fresh demise to another nominal character, it becomes the action of a new plaintiff upon another right": Christian's note to Sharswood's Bla. Com. 205.

This is the reason given in the books. By a new demise, a different term is created, a new possession and ouster alleged, and the matters directly alleged are different from those directly alleged in the former suit. The recovery alone, there-

fore, could not be a bar, as a different term was recovered. And the determination of the title was not available as matter of estoppel, because it was not directly in issue. And thus the title—the “fact in controversy,” but not “directly in issue”—might be again and again “collaterally and incidentally” tried. The judgment is not conclusive upon the title till it has been “directly” put in issue and determined. In an action for mesne profits, brought after a recovery in ejectment, the judgment in the ejectment suit was conclusive evidence of the plaintiff’s right to recover from the date of the demise laid in the action of ejectment, for the reason that the right to the possession of the particular term for which the mesne profits were demanded was directly in issue, and established in the ejectment. So in the action of trespass *quare clausum fregit*, the gist of the action is the injury done to the plaintiff’s possession. But it frequently happens that the title is directly put in issue and determined, and when “a verdict is found on any fact or title distinctly put in issue in an action of trespass, such verdict may be pleaded by way of estoppel in another action between the same parties, or their privies, in respect to the same fact or title:” *Outram v. Morewood*, 8 East, 346. In this case (page 354) Lord Ellenborough says, “that a recovery in any one suit, upon issue joined on matter of title, is equally conclusive upon the subject-matter of such title; and that a finding upon title in trespass, not only operates as a bar to a future recovery of damages for a trespass founded on the same injury, but also operates by way of estoppel to any action for an injury to the same supposed right of possession”: *Id.*

In many states of our own country, the common-law action of ejectment has either been abolished, or the proceedings materially modified; and we shall now examine some of the decisions under such modified proceedings for the recovery of real property bearing upon the question under consideration.

In Connecticut, if the common-law action of ejectment was ever in use, it was abandoned at a very early period, and a proceeding substituted, generally called an action of disseisin, sometimes ejectment; but whether the change was originally made by virtue of statutory provisions or by the courts, we have not been able to discover with certainty,—probably by rules of practice adopted by the courts under statutory authority.

In the revised statutes of Connecticut of 1824, the only provision bearing on the subject under discussion which we have

been able to find is, that "the process in civil actions shall be by summons or attachment," and "shall be accompanied with a declaration containing the cause of action": Laws of 1824, p. 34, sec. 1; that "all suits wherein title to land is to be tried and determined . . . shall be brought and tried in the county where the land lies": Id., sec. 21; "that the parties shall make their pleas and join issue according to the rules and orders established by the court": Id., sec. 29; that "the general issue of not guilty, owe nothing, did not assume and promise, no wrong or disseisin, or any other general plea proper to the action whereby the whole declaration is put in proof, according to the nature of the action, may be made by the defendant, under which general plea the defendant shall be at liberty on the trial of the cause to give in evidence his title," etc., provided he shall not give in evidence under the general issue any matter required to be specially pleaded at common law without giving notice, etc.: Id., sec. 30. Similar provisions as to the mode of commencing suits and the general issue are also found in the revised laws of 1796.

Smith v. Sherwood, 4 Conn. 280 [10 Am. Dec. 143], which arose in 1822, was an action of disseisin or ejectment. The plaintiff alleged title and a disseisin. The defendant, by way of estoppel, pleaded a former judgment in a similar action, and averred that the title of the plaintiff in that action was the only subject of determination. Plaintiff demurred to the plea. The plaintiff, in the first action, alleged title and a disseisin. The defendants pleaded "no wrong and disseisin," and the jury found for defendants. The question was as to the sufficiency of the plea of estoppel. The court were equally divided on the question, Hosmer, C. J., and Brainard, J., holding it to be insufficient, and Bristol and Peters, JJ., holding it sufficient. Hosmer, C. J., says: "Neither can the record be an estoppel to the plaintiff's demand, as the ground of determination does not appear. The defendants, it was found, did not disseise Salmon, and the verdict may have been rendered upon the fact that they had not been in possession of the premises, or that they had possessed by license from plaintiff, or for other reasons which never involved the validity of his title. It is impossible to say, upon an inspection of the record only, that the title of Salmon was ever drawn in question. The estoppel, if there be one, must be founded on the averment of the defendant in his plea that the title of Salmon was the only subject of determination." He then holds that to constitute an

estoppel, not only must the precise point which is to create the estoppel have been put in issue and decided, but also that this must appear from the record alone,—that the record cannot be helped out by averment and parol proof. It will be seen here that the distinguished judge put his decision upon the ground that, although title was alleged, the general issue, “no wrong and disseisin,” did not necessarily put it in issue, for a failure to prove the defendants to have been in possession would entitle them to a verdict on that plea, and the record would not show but that this was the ground of the verdict. But he does not deny that the estoppel would have been good, if issue had been distinctly taken on the title. The implication, from what is said here, and by the same learned judge in 6 Conn. 164, and 5 Id. 132, in respect to the general issue, is that it would. On the other hand, Bristol, J., stoutly maintains that the plea is good, notwithstanding the trial of the first case was had upon the issue of “no wrong and disseisin.”

He says (page 284): “The action of disseisin (called indiscriminately disseisin or ejectment) is the only real action known to our laws. Whether the plaintiff declares upon a seisin in fee, or any lesser estate, it is the only remedy for settling the title to real property. This is probably the first time that a doubt has been intimated as to the nature of the action, and of its being adapted to the great business of terminating disputes concerning the title to land.”

After discussing the question at length, and citing and commenting on the case of *Outram v. Morewood*, 3 East, 346, he proceeds (page 286): “Let it be tested by the undoubted principles of that case. The plaintiff, Salmon, in the record, alleged that he was seised in fee of the land in question, and that Sherwood disseised him. The defendant pleaded the general issue. Now, was not the title directly in issue between the parties, being affirmed by the plaintiff, and this affirmation denied by the defendant? Suppose judgment had been rendered for the plaintiff, to recover the land upon a verdict that he had done wrong and disseisin, could the defendant, just turned out of possession by execution, without any new title, bring another action of ejectment against the former plaintiff, and try the title? Should the last jury differ from the first, and decide that he had title, he would again go into possession; and the parties, after two lawsuits, arrive at the point from which they started, and with the consolation that the same game might be continued without end. Most certainly, the defendant in an ac-

tion of disseisin must be permitted to bring a new action, and try the title again, notwithstanding a prior recovery of ejectment against him, provided the plaintiff, in case a judgment is rendered against him, can be permitted to bring a new action for the same land; for the judgment must bind both, or it can bind neither. It is obvious, then, that had Salmon recovered in the former suit, the judgment would have concluded the defendant's title, as that title was directly put in issue and found against him; and it would seem a dictate of justice as well as law, that the judgment being in favor of the defendant, should be equally conclusive in his favor."

Again, upon the question whether the entire matter of estoppel must appear by the record, he said (page 287):—

"The defendant has averred that on trial of the case of Salmon, the ouster was proved and admitted by the defendant, and consequently the judgment and verdict proceeded on the ground that Salmon had no title. The only question therefore is, whether such averments are admissible. These averments are consistent with the record. They do not contradict it. The title was undoubtedly in issue by the declaration and plea, and the only effect of the averment is to show, what is consistent with the record, that the verdict was found in favor of the defendants because Salmon had no title. To permit such averments seems indispensable to attain the purpose of justice; and they have frequently been admitted in similar cases: *Hutchins v. Camp*, 2 Blackf. 827; *Sedden v. Tutop*, 6 Term Rep. 607; *Rover v. Fowne*, 4 Id. 146. Numerous cases in our sister states recognize the necessity and propriety of showing by averments anything not contradictory to the record when the question is whether a former judgment bars a subsequent suit."

And such seems to be the current of authorities on this point: *Gardner v. Buckbee*, 3 Cow. 127 [15 Am. Dec. 256]; *Young v. Black*, 7 Cranch, 565; *Bunt v. Steinburgh*, 4 Cow. 559 [15 Am. Dec. 402]; *Lawrence v. Hunt*, 10 Wend. 85 [25 Am. Dec. 539]; *Young v. Rummell*, 2 Hill, 478 [38 Am. Dec. 594]; *McKnight v. Dunlap*, 4 Barb. 36; *Beebe v. Elliott*, 4 Id. 457; *Doty v. Brown*, 4 N. Y. 71 [53 Am. Dec. 350]; 2 Smith's Lead. Cas. 575. But they are not entirely uniform, and subsequent decisions seem to settle the point the other way in Connecticut.

It will be seen that the question in this case was as to whether the title was shown by the record to be in issue and determined on the plea of "no wrong and disseisin"; and if

not, whether the record could be aided by averment, and not as to the effect of the judgment, if in issue. If the title was shown by the record to be determined, or the record could be aided by averment, it seems to be taken for granted by all the judges that the judgment would have been conclusive.

Mr. Chief Justice Swift, in his digest of the laws of Connecticut, says, in relation to this subject: "In several states in the Union they have copied, in substance, the English forms of real actions, with such variations as local circumstances required. In Connecticut we have introduced one action which comprehends and answers the purposes of the whole. This is indiscriminately called an action of ejectment or an action of disseisin. Like the writ of right, it definitely settles the title and is a bar to another action." Here the sentence ended in the former edition. But Professor Dutton, in the revision of 1851, made since the case of *Smith v. Sherwood*, 4 Conn. 280 [10 Am. Dec. 143], arose, adds this qualification: "Provided issue is taken on such title. But if on the general issue no wrong or disseisin is pleaded, the judgment, whether for plaintiff or defendant, will not be an estoppel. The defendant in this action may plead an estoppel specially." Mr. Chief Justice Swift proceeds: "Like the writs of entry and assize, it will lie for possessory rights. Without the formalities and delays of real actions, or the fictions of the writ of ejectment, it comes directly to the object in the simplest form and with all the ease and expedition of a personal action": 1 Revision Swift's Dig. 507; see also page 666.

So also, in Connecticut, the party in whose favor the title to land is determined by an award of arbitrators may avail himself of it in a subsequent action by way of estoppel: *Shelton v. Alcox*, 11 Conn. 248.

Thus, in Connecticut, if issue be taken distinctly on the title, the verdict and judgment are conclusive upon the same principles that judgments in other actions conclude the parties.

In South Carolina, the action of ejectment, with some statutory modifications, was formerly in use. In 1791, the action of ejectment was abolished, and the action of trespass to try title substituted. The effect of the judgment upon the rights of the defendant in this action was left to be determined by the principles of the common law. And it was held in *Thomas v. Geiger*, 2 Nott & McC. 528, that "the defendant, in an action of trespass to try title, cannot, after a recovery against

him, in turn become plaintiff and sustain a second action to try title." The court say (page 530): "It has been contended that a change of action does not alter the rights of the parties; and therefore in an action of trespass to try title, the parties retain the power of renewing the action as often as was permitted in an action of ejectment. The rights of the parties must not be confounded with the incidents peculiar to forms of action. The fictitious action of ejectment was substituted for the real action. As trespass to try title is now substituted for ejectment, were the rule contended for to prevail, trespass to try title as well as ejectment must be governed by the incidents peculiar to a real action. This doctrine would leave no other difference between a real action, ejectment, and trespass to try title, than a name. The legislature, however, contemplated a greater change. They were dissatisfied with the fictitious proceedings in ejectment, and their consequences, and therefore substituted the action of trespass."

Prior to 1847, the action of ejectment was in use in Georgia. In that year an act was passed which provides, "that from and after the passage of this act, the form of a declaration for the recovery of real estate and mesne profits may be as follows, etc., to wit:—

"[Title of cause.] The petition of A B sheweth that C D is in possession of a certain tract of land in said county [here describe the land], to which your petitioner claims title; that C D has received the profits of said land since, etc., and refuses to deliver said land to your petitioner, or to pay him the profits thereof. Wherefore, your petitioner prays process, etc.: Cobb's New Dig. Laws of Georgia, 1851, p. 490."

There is no provision as to the effect of the judgment. In *Hilliard v. Connolly*, 7 Ga. 172, it was held that a plaintiff, if he chose, might, notwithstanding this provision, still proceed under the old forms of the action of ejectment. But in *Sims v. Smith*, 19 Ga. 124, a verdict and judgment in an action brought under the act of 1847, just cited, was held to be conclusive, even when set up in a subsequent action of ejectment brought in the common-law form for the same land. In this case the second action was brought under the old form. The former recovery, under the form prescribed in the act of 1847, was pleaded in bar. No new title or right of possession since the verdict in the former action was shown. Mr. Justice Starnes, who delivered the opinion of the court, says (page 125):—

"The rule of practice, as derived from the English courts, was, that a recovery in ejectment did not bar a subsequent action. The rule was founded, I suppose, upon the nature and character of the action." After stating the character of the action, he proceeds: "All this ingenuity and contrivance had their origin, no doubt, in the high estimate which was placed upon real estate in England, and its immense importance as an element in the feudal policy. But whatever may have been the reason of the rule, such it was,—and we have made it a part of our law.

"We are all ready to admit, however, I suppose, that there is no necessity for the rule with us; that there is no reason in our state, while a suitor claiming real estate in a court of justice should have this advantage over one who was suing for personal property; that substantial and practical reasons cannot be assigned for it. Still, if called upon to enforce it in such a case and under such circumstances as would demand its enforcement at the common law, we should feel constrained to adopt it. But when a different case is presented, arising in part out of our own legislation, we are at liberty to adopt a more reasonable and practicable rule. The case is presented here. The first action, brought according to the provisions of our statute of 1847, was a real substantial claim of title, and it was determined against the plaintiff.

"Now, we regard the act of 1847 as intended to try title, not possession. The plaintiff, confessedly, cannot directly bring another action against the defendant under and by virtue of the provisions of the statute, for the purpose of trying the title to the same premises. Shall he be allowed to do so circuitously by adopting the common-law fiction? This unreasonable result is avoided by holding that the common-law rule, which we have been considering, can properly be held applicable to a case of ejectment only when the common-law forms have been adopted and followed by the plaintiff,—that the act of 1847 repeals the common-law fiction as to all cases where it is followed; and when a verdict is rendered under it, the common-law fiction must give way, and can no longer apply if another case be brought by the plaintiff against the defendant, in the form of common-law ejectment, if it can be shown that the latter case is in truth and in fact an action for the trial of the same title."

Thus we see, upon a careful examination of the subject, that the forms and fictions of the action of ejectment are of

the very essence and substance of the action, and that wherever its forms are swept away, its peculiar incidents and consequences go with them.

In several of the states, as in New York and Illinois, there are special statutes regulating actions for the recovery of real estate. In such cases, the forms of the common-law action of ejectment are generally abolished, and another form substituted; and—what would naturally be expected as a consequence of the change of the form in the action—the effect of the judgment is also modified, regulated, and prescribed. Sometimes one new trial in the same action is granted, as a matter of right, and another upon a proper showing, in the discretion of the judge. But when finally determined in that action, it is made conclusive. The statutory form of a declaration in New York does not even allege title. It only alleges a possession by plaintiff, and an ouster by defendant. Yet the judgment is made conclusive. A second trial, if any be had, must be in the same action.

But these provisions granting new trials, as a matter of absolute right, were adopted many years ago, when the old ideas as to the peculiar importance and sacredness of real estate, in comparison with personalty, still lingered in the minds of the people. At this day, and especially in the new states, little more importance is attached to real estate than to personal property of equal value. It is almost as much an article of traffic, commerce, and speculation as merchandise. No restraints are thrown around its alienation, except so far as are necessary for the protection of parties dealing in it, by enabling them to trace and preserve the evidence of titles, and judge of their validity. Since the change in the form of actions, no technical reason exists—and we can perceive no substantial reason inherent in the nature of the property—why the title to a piece of land should not be finally determined by one trial fairly conducted, in which no error occurs, that does not apply with at least equal force to an action for the recovery of a horse, a ship, or any other piece of personal property of equal value; and a judgment upon title to a ship or other personal property is conclusive: *Dennison v. Hyde*, 6 Conn. 516. In fact, if there is any difference, the reason is stronger for a second trial in the case of personalty than of realty; because, from the fixed character of real estate, the muniments of title can be more easily preserved and traced. The evidence of title may be, and generally is, of record, open

to the examination of all, — always at hand, and easily produced whenever occasion requires; while the evidence of title to personalty generally, to a great extent, rests in parol, — is more evanescent in character, more liable to be lost, or if in existence more liable to be beyond the reach of the party at the particular time when he has occasion to produce it. Hence, a party is much less likely to be able to present the full strength of his case at the time when forced into trial of the right to personal property, than upon a similar trial as to realty. Neither is there anything in the particular estate which a party may have in the property, or the character of the right sought to be enforced, that distinguishes one kind of property from the other.

One party may have the absolute right of property; a second, the right of enjoyment for a specified time; a third, a right of immediate possession; and a fourth, the actual, rightful or wrongful possession of personalty as well as of realty; and there may be injuries to the rights of each of these parties, for which they have a remedy. A party may recover possession who has no right of property, as well as in the case of realty; and we can see no reason why a judgment upon a matter in regard to realty, once put in issue, litigated and determined, — whether it be title, a right of present possession, or something else, — should not be conclusive, as well as when it relates to personalty. No principle of the common law would be violated by such a result. On the contrary, its rules require it. Nor would it be contrary to any principle of public policy.

Mr. Greenleaf says: "The rules of law upon this subject are founded upon these evident principles, or axioms, that it is for the interest of the community that a limit should be prescribed to litigation; and that the same cause of action ought not to be brought twice to a final determination. Justice requires that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question between those parties should be forever closed": 2 Greenl. Ev., sec. 522.

If there is any litigation that the "interest of the community," and "the public tranquillity demand," "should be forever closed," after one full and fair trial, — or even without trial unless it be speedily had, — it is, in our judgment, litigation in respect to titles to lands. And such was manifestly the opinion of the legislature of this state; for in adopting a statute of limitations that should bar all actions in relation to

realty, they fixed upon the unprecedentedly short period of five years. And in prescribing the mode of proceedings in civil cases, that body left the action for the recovery of real estate untrammelled by any of the forms and fictions that pertained to actions of ejectment, and to the almost innumerable variety of other proceedings relating to real and mixed actions at common law. They made no distinction between personal and real actions, but left them all to be governed by the same principles and attended by the same incidents and consequences. Whether the action be real or personal, the plaintiff alleges the facts that constitute his cause of action. There is no general issue. The defendant must take issue directly upon each material allegation by denying it, or it will be taken against him as admitted. Whatever is put in issue and passed upon, is, upon the principles of the common law, finally determined. In the language of Mr. Chief Justice Swift, in speaking of the action of disseisin in Connecticut, as distinguished from the numerous real actions at common law, before quoted, we have but "one action which comprehends and answers the purpose of the whole. Like the writ of right it definitely settles the title, and is a bar to another action, provided issue is taken on such title. Like the writs of entry and assize, it will lie for possessory rights. Without the formalities and delays of real actions, or the fictions of the writ of ejectment, it comes directly to its object in the simplest form, and with all the ease and expedition of a personal action."

It does not follow that a party suing to recover the possession of land must use the same stereotyped form of complaint or that he must allege title in fee, because he may do it. He need not of necessity, adopt the precise form of complaint which was in controversy and approved in *Payne v. Treadwell*, 16 Cal. 243. The form may be adapted to the estate sought to be recovered and the facts desired to be put in issue. The cause of action should be stated according to the facts. In the language of Mr. Chief Justice Field in that case (page 245), the plaintiff may aver "that he is seised of the premises, or of some estate therein, in fee, for life or for years, according to the fact"; or "when the plaintiff has been in possession of the premises for which he sues, it will be sufficient for him to allege in his complaint such possession and entry, ouster, and continued withholding by the defendant. Such allegations are proper when they correspond with the facts, but they are not essential": *Id.* 244. But whatever is put in issue, and determined, is conclusive and final.

If a party declares upon a seisin in fee, and thus puts his title in issue, and chooses to rely upon a prior possession merely, or does not choose to put in all his evidence of title, or is unable from any accident to get it in, he is in no worse position than many other parties, who for any reason fail in personal actions to get in sufficient or all their evidence. Prudent counsel, where, from any unforeseen accident they fail to make as strong a case as the facts and evidence attainable should enable them to do, and they are not satisfied of the sufficiency of their proofs, will submit to a nonsuit, or in a proper case, with the permission of the court, withdraw a juror and begin again. If they do not, they cannot complain that the judgment against them in the action should be followed by its legitimate consequences.

In order that we may not be misapprehended, we will add that the estoppel of a verdict and judgment is necessarily limited to the rights of the parties as they exist at the time when such verdict and judgment are rendered, and cannot preclude either party from showing that their rights have been varied or extinguished at a subsequent period. No injury, therefore, can result on that ground.

In this case, the record offered in evidence, and excluded by the court, shows that in the former suit the title was distinctly put in issue and determined (the possession of an undivided half was admitted by the answer); that the undivided forty-one eighty-first parts was found and adjudged to be in the plaintiffs and forty eighty-first parts in the defendant; that the same title and the same ouster were relied on in this action,—for the plaintiffs proved that the defendant's possession extended as far back as 1857, before the commencement of the former action, and no evidence of title acquired since the former suit was offered. The court therefore erred in refusing to admit the record in evidence, and the judgment must be reversed.

Another question of great importance has been presented in this case, and elaborately argued, which the counsel urge us to decide. But under the views we have taken, it becomes unnecessary to determine the question in this case, and the importance of the questions already discussed have required so wide a range of investigation that we have already devoted as much time to the consideration of the case as the accumulated business and other pressing duties of the court will admit of at this time.

This cause was decided by the late supreme court, Mr. Justice Crocker delivering the opinion, in which all the justices concurred. At the time of the transfer of the cause to the new court, there was a petition for rehearing pending. As the questions involved were new in this state, and supposed to be of great practical importance, a rehearing was granted in order that they might be further considered. Upon a thorough examination of the case, we have arrived at the same conclusions as those attained by our predecessors, and upon substantially the same grounds.

Let the judgment be reversed, and the cause remanded for further proceedings.

RHODES, J., concurred.

CURREY, J., dissented.

JUDGMENT IN EJECTMENT, CONCLUSIVENESS OF.—Undoubtedly at common law a judgment in an action of ejectment was not a bar to another and similar action, and the chief reason for this was undoubtedly due to the fictitious character of the action. If a question was tried and settled between John Doe, plaintiff, and A B, who comes in and is substituted as defendant in place of Richard Roe, the casual ejector, it is plain that A B cannot plead the verdict and judgment in bar of another suit brought by John Den against Richard Fen, though the devise may be laid from the same lessor, for there is no privity between John Doe and Richard Den. Originally ejectment was only an action of trespass by a lessee against one who had ousted him of his term. The plaintiff recovered only the possession, and the freehold was not directly in controversy. In the action only a term was recovered as it was founded on the assertion of an existing lease, and the declaration negatived the ownership of the freehold by the plaintiff. It is obvious that the very structure of such a record rendered it impossible to plead a former recovery in bar of a second ejectment. Each succeeding action supposed a new demise, and as the plaintiff was only a fictitious person, and as the demise might be laid in any number of ways, it never could appear that the second ejectment was for the same thing as the first. Another reason why the judgment in an action of ejectment was held inconclusive was the peculiar sanctity and respect with which real estate was regarded at common law. This feeling was so deep that the courts were not willing that the claim to it should, like all other claims, be settled forever by one trial in an ordinary personal action, and consequently permitted the unsuccessful party to have other opportunities of asserting his title: *Freeman on Judgments*, sec. 295; *Miles v. Caldwell*, 2 Wall. 35; *Sturdy v. Jackaway*, 4 Id. 174; *Stevens v. Hughes*, 31 Pa. St. 381; *Van Wyck v. Seward*, 1 Edw. Ch. 327. These views will be found supported by nearly all the succeeding cases. But the forms of the ancient action of ejectment have not been adopted in the United States, and in most of the states of the Union a special action for the recovery of real property has been provided for or created by statute. In the different states these actions vary, but to them all, for the purpose of identifying them as actions for the recovery of realty, the name ejectment is generally if somewhat

erroneously applied. Now as regards the estimation in which land is held, in the language of the supreme court of the United States, "there is a great difference in the different states in the value attached to real estate, and to the title by which it is held, as compared with other species of property. But there is no doubt entertained that in all of them the feeling is far removed from that which formerly prevailed in England, or which prevails there even now. While some of our older states still uphold many of the safeguards of the common law, with its complicated system of conveyancing operating as a strong drag upon the facility of transfers of real property, our Western people traffic in land as they do in horses or merchandise, and sell a quarter-section of land as readily and as easily as they do a mule or a wagon. The laws of a people correspond with their habits. Deeds of conveyance are by statute rendered exceedingly simple and effectual, the main safeguard being a well-digested system of registration. In consonance with this general facility of traffic, it is their policy to prevent those endless litigations concerning titles to lands which in other countries are transferred from one generation to another. The rapid settlement of a new country requires that a title once fairly determined shall not be again disturbed as between the same parties": *Miles v. Caldwell*, 2 Wall. 35.

The effect of the statutory provisions of the different states upon the action of ejectment renders that action one which affects the title of the property in controversy in it. It binds that title, not only as to the parties to the action, but also as to all who derived title under them from the time of the commencement of the action. To that extent, the judgment, while it remains in force, conclusively settles the rights of the parties, and those claiming under them, or either of them, to the property in controversy. Where issue is made by the parties in their real names, and the land is accurately described, a verdict and judgment in such action, where the title to the fee is in question, is a bar to a second trial for the same cause of action between the same parties, and those in privity with them, unless the statute provides to the contrary: *Freeman on Judgments*, sec. 299; *Stowell v. Chamberlain*, 60 N. Y. 572; *Dawley v. Brown*, 79 Id. 390; *Doe v. Gustard*, 5 Scott N. R. 145; *Amesbury v. Castro*, 49 Cal. 325; *Sims v. Smith*, 19 Ga. 124; *Dickerson v. Powell*, 21 Id. 143; *Parish v. Ferris*, 2 Black, 606; *Hodges v. Eddy*, 52 Vt. 343; *Hayner v. Stanley*, 12 Fed. Rep. 217; *Marshall v. Shafter*, 32 Cal. 176; *Miles v. Caldwell*, 2 Wall. 38; *Blanchard v. Brown*, 3 Id. 249; *Campbell v. Rankin*, 99 U. S. 263; *Shinn v. Young*, 57 Cal. 525; *Bertram v. Cook*, 44 Mich. 396; *Barrows v. Kindred*, 4 Wall. 399; *Sturdy v. Jackaway*, 4 Id. 174; *Satterlee v. Bliss*, 36 Cal. 489; *Ainsley v. Mayor*, 1 Barb. 169; *Marvin v. Dennison*, 1 Blatchf. 160; *Brewer v. Beckwith*, 35 Miss. 467; *Parks v. Moore*, 13 Vt. 183; S. C., 37 Am. Dec. 589; *Edwards v. Roys*, 18 Id. 473; *Sheridan v. Andrews*, 3 Lans. 129; *Cadwallader v. Harris*, 76 Ill. 371; *Johnson v. Pate*, 90 N. C. 334; *Parker v. Stambaugh*, 71 Ga. 735; *Troutman v. Vernon*, 1 Bush, 482; *Marvin v. Dennison*, 20 Vt. 682; *Beebe v. Elliott*, 4 Barb. 457; *Smith v. Kernochan*, 7 How. 198; *Payne v. Payne*, 29 Vt. 172; *Blanchard v. Brown*, 3 Wall. 235; *Kinter v. Jenkins*, 43 Pa. St. 445; *Spence v. McGowan*, 53 Tex. 30; *Craig v. Watson*, 68 Ga. 114; *Foster v. Evans*, 51 Mo. 39; *Thompson v. McKay*, 41 Cal. 221; *Wooden v. Clemence*, 33 Iowa, 280.

In several of the states, however, there still continues to linger the idea of a difference between rights to real property and rights to personality and judgments in ejectment are not considered conclusive. In such states, provision is usually made by statute for a new trial. In Pennsylvania two judgments and verdicts are necessary to conclude the title: *Woolston's Appeal*, 51

Pa. St. 452; *Drexel v. Man*, 44 Am. Dec. 195; *Blackmore v. Gregg*, 36 Id. 171; *Evans v. Patterson*, 4 Wall. 224. The statute of New York formerly provided that at any time within three years after the rendition of a judgment in ejectment, the defeated party, upon complying with certain conditions, may have the judgment vacated, and a new trial granted: *Chautauque County Bank v. White*, 23 N. Y. 347. But such judgments are now conclusive from the time of rendition: *Sheridan v. Andrews*, 3 Lans. 132. In Illinois, where the facts in such an action are litigated, the judgment is conclusive from the time of the commencement of the suit; but where the judgment is by default, it is not conclusive until after two years from that time: *Cadwalader v. Harris*, 76 Ill. 372. In Minnesota, two verdicts and judgments are necessary, after which the judgment becomes conclusive, subject of course to review for error: *Baze v. Arper*, 6 Minn. 220. There was a statute in Missouri at one time making judgments in ejectment conclusive: *Miles v. Caldwell*, 2 Wall. 35-44; but this statute has been repealed, and now a judgment in an action of ejectment is no bar to the prosecution of another suit for the recovery of the same premises: *Slevin v. Brown*, 32 Mo. 176; *Holmes v. City of Carondelet*, 38 Id. 551; *Foster v. Evans*, 51 Id. 39; *Kimmel v. Benna*, 70 Id. 52.

In Pennsylvania, under their statute requiring two verdicts and judgments to conclude the unsuccessful litigant, one verdict and judgment upon an equitable title is conclusive between the parties, and a bar to any subsequent ejectment for the same land. This rule applies to all equitable titles. When the action is brought upon an equitable title, it is regarded as a bill in equity, and not as a possessory action at common law, and a verdict and judgment therein will have the same conclusive effects as those which follow a final decree in a court of equity: *Seitinger v. Ridgway*, 9 Watts, 496; *Peterman v. Huling*, 31 Pa. St. 432; *Trefts v. Pitts*, 74 Id. 343.

One who enters into possession of disputed premises during the pendency of an action to recover, claiming under an adverse paramount title, is not affected by the judgment: *Smith v. Pretty*, 22 Wis. 655. A tenant of the defendant in ejectment who acquired his lease before the commencement of the suit, is not estopped as to his term, by a judgment in the action obtained against his lessor: *Satterlee v. Bliss*, 36 Cal. 489; a recovery in ejectment against the vendee of land who is in possession under an unexecuted contract of purchase is not conclusive upon the rights of the vendor, even though he had notice of the pendency of the suit, and cannot be set up to defeat an action of ejectment subsequently brought by him for the same land: *Cadwalader v. Harris*, 76 Ill. 370. A judgment in ejectment against a tenant is not conclusive upon the landlord, although the latter retained an attorney to defend the suit against the tenant: *Ryers v. Rippey*, 25 Wend. 431. A judgment in an action of ejectment against the plaintiff because of his not having the legal title to the premises is no bar to a second action by him upon an after-acquired legal title, as the titles adjudicated upon in the two suits are not the same. Having acquired a new and distinct title, he has the same right to assert it in a new suit, as would a stranger who had acquired it: *Barrows v. Kindred*, 4 Wall. 399; *Hawley v. Simons*, 102 Ill. 115; *Barrett v. Birge*, 50 Cal. 655; see also *McLane v. Bovee*, 35 Wis. 27. In an action of ejectment against a tenant, if his landlord assume the defense he is bound by the judgment: *McCreary v. Everding*, 54 Cal. 168; *Valentine v. Mahoney*, 37 Id. 389; *Russell v. Mallon*, 38 Id. 253; *Douglas v. Fulda*, 45 Id. 592.

For a further discussion of the effect and conclusiveness of a judgment in an action of ejectment, see *Howard v. Kennedy's Ex'rs*, 39 Am. Dec. 307, and

note; note to *Agnew v. McElroy*, 48 Am. Dec. 775; note to *Doty v. Brown*, 53 Id. 355; note to *Batterson v. Chiles*, 54 Id. 546.

The principal case was cited and discussed in *Marshall v. Shafter*, 32 Cal. 176, 189, 199, where it was held that if the respective titles of the parties, or their rights to the possession of the demanded premises, are put in issue and tried in ejectment, and the plaintiff recovers judgment for possession, the judgment is an estoppel, and the defendant to avoid the estoppel in a subsequent action to recover the same premises must show some other right of possession than he had when the judgment was rendered. The fact that the judgment is not that plaintiff recover the title, but only that he recover the possession, does not prevent the judgment from being an estoppel as to whatever rights the parties respectively possessed. In *Vance v. Olinger*, 27 Id. 358, the principal case is cited and it is held that a party may have two suits against the same defendant for the recovery of the same land, pending at the same time if the second is brought on a title acquired after the commencement of the first. In *Mahoney v. Van Winckle*, where the principal case is cited, it was held that a judgment in ejectment is not an estoppel as to new matters occurring after its rendition which give the defendant a title or right of possession, and if such new matters are *in pais* they may be proved by parol.

Our principal case is cited, where the general conclusiveness of judgments are considered, in *Jackson v. Lodge*, 36 Cal. 28; *Garwood v. Garwood*, 29 Id. 514; *Ekhridge v. Jackson*, 2 Saw. 603, 620; *Avery v. Superior Court*, 57 Cal. 249.

HOOPER v. WELLS, FARGO, AND COMPANY.

[27 CALIFORNIA, 11.]

LIABILITIES OF COMMON CARRIERS AND FORWARDERS, independent of any express stipulation in the contract, are entirely different.

COMMON CARRIER IS INSURER OF PROPERTY INTRUSTED TO HIM against all events except the act of God or public enemies.

FORWARDERS ARE NOT INSURERS. — Their liability is like that of warehousemen and common agents, and is governed by the general rule applicable to other bailees for hire not subject to extraordinary liabilities. They are responsible for all injuries to property, while in their charge, resulting from negligence, or misfeasance of themselves, their agents, or employees.

RESTRICTIONS UPON COMMON-LAW LIABILITY OF COMMON CARRIER, for goods intrusted to him for transportation, are to be construed most strongly against the common carrier, especially where they have been inserted in a receipt drawn up by himself for his own benefit, and signed by him alone.

EXEMPTIONS TO CARRIER'S COMMON-LAW LIABILITY ARE TO BE STRICTLY INTERPRETED, and it is the carrier's duty to bring his case strictly within them.

EXPRESS COMPANY'S RECEIPT, CONSTRUCTION OF. — The receipt of an express company for goods intrusted to it for transportation for hire, and which restricts the liability of the company, will not be construed as exempting the company from liability for loss occasioned by negligence in the agencies it employs, unless the intention to thus exonerate the company is expressed in the instrument in plain and unequivocal terms.

FORWARDERS ARE LIABLE FOR NEGLIGENCE OF MANAGERS OF VARIOUS PUBLIC CONVEYANCES, such as stages, steam-tugs, lighters, and ocean steamers employed by them for delivering goods. Such managers are the agents and employees of the forwarders; and an express company making itself liable only "as forwarders" is subject to the same liability.

EFFECT OF RESTRICTIVE CLAUSE IN EXPRESS COMPANY'S RECEIPT, signed by it alone and given to the shipper, stating that the company is "not to be responsible except as forwarder," where it undertakes to transport bullion for hire, from one place to another, "and deliver to address," is not to exempt it from liability for loss occasioned by the carelessness or negligence of the employees on a steamboat owned and controlled by other parties than the company, but ordinarily used by it, as a means of conveyance, in its business as carrier. The managers and employees of the boat are in such a case the agents of the express company.

COMPLAINT CANNOT BE AMENDED IN SUPREME COURT so as to make it correspond with the verdict; but the district court, in a proper case, may before judgment direct the complaint to be so amended.

THE facts are stated in the opinion. No interest was claimed in the complaint, but the verdict of the jury included interest.

Delos Lake, A. Campbell, and John H. Saunders, for the appellants.

H. and C. McAllister, for the respondent.

By Court, SAWYER, J. This is an action to recover the sum of \$10,755, the value of a package of gold bullion delivered to defendants, at Los Angeles, to be transported to San Francisco, and which was lost in consequence of the explosion of the boiler of the steam-tug *Ada Hancock*, while being transported in charge of defendants' messenger from the shore, at San Pedro, to the anchorage of the steamer *Senator*.

The plaintiff, to maintain the action on his part, proved that "the defendants were and are a company engaged in the public express business; that is to say, in receiving, forwarding, carrying, and delivering, by sea or by land, for any one who employs them, treasure, goods, and packages for hire from place to place within and without this state, in care of their own messengers, in vessels, and conveyances, and steamers, and boats, and vehicles, owned by others, and ordinarily used by the public at large, as the common and public mode of transportation and conveyance.

"That said defendants had an agency and an agent at Los Angeles, for the purposes of their said public express business; their principal office and agency for the state of California being at San Francisco.

"That the usual modes of public conveyance and trans-

portation between Los Angeles and San Francisco were, at the time hereinafter mentioned, and for a long time prior thereto, by a line of stage-coaches the whole way, and also by stage-coach from Los Angeles to San Pedro, and from San Pedro to San Francisco by a steamer called the Senator; that an agent of the defendant always traveled on said steamer Senator, between San Francisco and San Pedro, who, on arriving at San Pedro, proceeded to Los Angeles by stage-coach, and there received from the Los Angeles agent all express matter that had been left there to be forwarded, carried, and delivered, returned with such express matter to San Pedro in time for the steamer Senator's return voyage, placed and shipped the express matter on board of such steamer, and returned on the steamer with the express matter in his charge to San Francisco, where it was in the first instance delivered at the general agency, and then delivered by such agency to the consignees or owners.

"That it was usual and customary for the steamer Senator, and all other coast steamers, on arriving at or approaching San Pedro, to anchor some three miles from shore, there not being sufficient depth of water to enable such vessels to approach the shore. That the usual means and mode of transporting goods and passengers between the shore and steamer was by steam-tug and lighters.

"That one of such usual and ordinary means was by a steam tug-boat of about forty-two (42) tons burden, called the Ada Hancock; that is, it was usual and customary for the defendants' messenger to go from the shore to the steamer with the express treasure in charge on said tug-boat, the heavier express freight being usually transported on lighters. That the express company was charged by the steamer the usual price for the passage of the express messenger and freight for all express goods, except treasure, which was carried in an iron box called the treasure-box, and was kept in the special charge of the messenger while on board the steamer, and no charge made by the steamer for its transportation.

"That as to any and all treasure transported by defendants upon said steam-tug Ada Hancock, or upon said steamer Senator, no bill of lading was ever given, and no written contract of affreightment was ever made therefor, neither was any note or memorandum in writing of the true character or value thereof ever given by the defendants, or by their agents or servants, to the master, or officers, or agent, or owner of said

steam-tug, or said steamer Senator. That no freight was ever paid by or charged against defendants or their agents for treasure laden by them on board said steam-tug to or from said steamer Senator. That the defendants used the usual means of public transportation in conducting their business, which was notorious, and known to the plaintiff at the time hereinafter stated.

"That on the twenty-first day of April, 1863, the plaintiff delivered at the city of Los Angeles, California, to the agent of the defendants at Los Angeles, a package of gold bullion of the value of ten thousand seven hundred and fifty-five dollars (\$10,755), to be transported to San Francisco in consideration of the sum of eighty dollars and sixty-five cents, then and there agreed to be paid to defendants by plaintiff, and on such delivery, received and accepted from said agent a paper, partly printed and partly written, of which the following is a copy, the portion thereof italicized being written, and the portion thereof not italicized being printed, namely:—

"WELLS, FARGO, & CO.'S EXPRESS.

"WELLS, FARGO, & Co.,

"EXPRESS,

"LOS ANGELES.

"Value, \$10,755.

April 21, 1863.

"Received of *George F. Hooper, dust and bullion*. Package, *value ten thousand seven hundred and fifty-five dollars*.

"Address, *Geo. F. Hooper*, which we agree to forward to *San Francisco*, and deliver to *address*.

"In no event to be liable beyond our route as herein receipted. It is further agreed, and is part of the consideration of this contract, that Wells, Fargo, & Co. are not to be responsible except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean or river navigation, fire, etc., unless specially insured by them, and so specified on this receipt. For the proprietors, P. BANNING, Agent.

"Charges Col., \$80.65.

Per SANFORD.'

"Said package of gold bullion of the value of \$10,755 has never been delivered by defendants to plaintiff, or to his address."

Defendants' agent at Los Angeles delivered said bullion to one Ritchie, the messenger or traveling agent of defendants between Los Angeles and San Francisco, who took charge of the same and transported it to San Pedro by public stage-

coach. For the purpose of placing said bullion and other treasure on board the steamer *Senator*, which then lay at anchor as usual, off the shore, for transportation to San Francisco, said Ritchie placed it on board the steam-tug *Ada Hancock*, himself accompanying the bullion, and having it in charge. Soon after said steam-tug having on board said bullion, said Ritchie and several other passengers for San Francisco started from the wharf for the purpose of placing said passengers, bullion, etc., on board said steamer *Senator*. Before reaching the anchorage of the *Senator*, the boiler of said steam-tug exploded, whereby the said Ritchie and several other passengers were killed, and said bullion lost. There was evidence tending to prove that the explosion was caused by the carelessness of the engineer and other officers of the said steam-tug. Defendants had no interest in said steam-tug, and no control over her management or navigation. The agents of defendants at Los Angeles had no authority to insure said bullion. The plaintiff had no option as to insuring or not insuring the same with defendants at Los Angeles. Insurance could only be effected thereon with said defendants at their office in San Francisco.

The court gave the jury the following instructions:—

“1. That if defendant be an express company, publicly engaged in transporting freight from one place to another for hire, they are common carriers, and subject to all the responsibilities of common carriers, except so far as they have modified them by agreement.

“2. That the mere fact that an express company use their own vessels and steamers, or the vessels or steamers of others, in no way affects their liabilities as common carriers.

“3. That if Wells, Fargo, & Co. shipped the treasure in question on board the steamer *Ada Hancock*, and there was an explosion of said steamer, by which the treasure was lost, and that explosion was occasioned by the negligence of the parties in charge of the *Ada Hancock*, then Wells, Fargo, & Co. are liable for the value of said treasure.

“4. An express company which is in the habit of carrying, for hire, packages containing coin, dust, and other articles of value, from one place to another, is a common carrier.

“5. Express companies which carry packages over routes where they employ other vehicles or means of conveyance than their own, are common carriers.

“6. They may, however, by contract, limit their liability as common carriers, and if you find by the evidence that the de-

defendants in this case did so limit their liability to the plaintiff, then the court charges you that such limit of responsibility must govern; but that does not relieve defendants from ordinary care in the discharge of their duties.

"7. The special agreement received in evidence cannot exempt defendants from accountability for losses occasioned by a defect in the vehicle or mode of conveyance used to effect the transportation.

"8. If you find, from the evidence, that defendants undertook to forward the gold dust in question from Los Angeles, and deliver the same to plaintiff at San Francisco, under a special agreement limiting the liability, defendants must be deemed to have undertaken the same degree of responsibility as that which attached to a private person, and were therefore bound to use ordinary care in the custody of the gold-dust, and its delivery, and to provide proper means of conveyance for its transportation.

"10. Should you find that the defendants shipped the treasure on board the steamer *Ada Hancock*, and there was an explosion of said steamer by which the treasure was lost, and that the explosion was occasioned by the negligence of the persons in charge of her, then defendants are liable for the value of the said treasure, by reason that they are responsible for injuries caused by the negligence of the agencies they employ in fulfilling the obligations of their undertaking."

The court also refused the following instruction asked on the part of defendants, to which refusal defendants excepted:—

"That if the defendants, by their agents, selected the steam-tug *Ada Hancock* for transportation of the treasure from the wharf to the Senator, and the jury find that at the time of such selection and of placing the treasure on board, the said tug was sufficient for the purpose of such contemplated transportation, then that the defendants are not responsible if the treasure was lost by any subsequent carelessness of the officers of the boat."

It is admitted by appellants' counsel that defendants, as to the transportation of said bullion, were acting in the capacity of common carriers; and such was undoubtedly their legal relation to said bullion at the time of its loss. It is further admitted,—and this proposition also admits of little doubt,—that defendants, under the law applicable to common carriers, are liable for its loss, unless such liability is restricted by the

express stipulations of the contract between the parties for the conveyance of said bullion.

It is insisted, however, on the part of defendants, that the contract contains express stipulations which exonerate them from all liability for the loss under the circumstances disclosed by the record; while on the part of plaintiff this proposition is controverted. If mistaken on this point, it is further claimed by the plaintiff that any stipulation in a contract which purports to exonerate a common carrier from loss resulting from the carelessness, negligence, or misfeasance of the carrier, or his servants or agents, is contrary to the policy of the law, and void. It is not pretended,—and it could not with any show of reason be pretended,—that the loss in question is within the meaning of the last clause of the receipt set out in the record relating to the dangers of navigation, etc. The clause relied on by defendants to relieve themselves from responsibility is as follows: "It is further agreed, and it is a part of the consideration of this contract, that Wells, Fargo, & Co. are not to be responsible, except as forwarders."

The liabilities of common carriers and forwarders, independent of any express stipulation in the contract, are entirely different. "The common carrier who undertakes to carry goods for hire is bound to deliver them at all events, unless injured or destroyed by the act of God or the king's enemies": *Edwards on Bailments*, 295. "A common carrier is regarded by the law as an insurer of the property intrusted to him; or in other words, he is legally responsible for acts against which he could not provide, from whatever cause arising, the acts of God and the public enemy only excepted": *Angell on Carriers*, sec. 67. There are many accidents against which common carriers cannot protect themselves by the exercise of the utmost care and skill on the part of themselves and their employees, for the result of which they are nevertheless responsible: *Edwards on Bailments*, 454 et seq.; and *Angell on Carriers*, c. 11, and cases cited. But the liability of "forwarders" is like that of warehousemen and common agents, and is governed by the general rule applicable to other bailees for hire not subject to extraordinary liabilities. They are responsible for ordinary care, skill, and diligence,—that is, such care and diligence as prudent men in similar circumstances usually exercise in the management of their own business: *Story on Bailments*, sec. 444. They are not, it is true, insurers like common carriers, but they are responsible for all

injuries to property while in their charge resulting from negligence, or misfeasance of themselves, their agents, or employees. In view of these principles governing the liabilities of "carriers" and "forwarders," what is the effect of the disputed clause in the contract under consideration upon the rights of the parties, plaintiff and defendants? What is the extent of the restriction upon the common-law liabilities of the defendants? The language must be taken most strongly against the defendants: *Edwards on Bailments*, 492. The instrument is executed by them alone. It was drawn up with care, in language selected by themselves, the blank form having been printed in advance ready to be presented to all persons offering property for transportation by their express. The restrictions were for their benefit. The owners of packages sent by express rarely examine with care, or indeed have an opportunity to critically consider the terms of the receipt presented to them; and general terms, under such circumstances, are apt to mislead. These are some of the reasons for the rule given in the books. In construing a covenant in a charter-party, Mr. Justice Curtis said: "The rule of construction as to exceptions is, that they are to be taken most strongly against the party for whose benefit they are introduced. . . . These words of exception being introduced by the covenantor for his own benefit, if they are capable of bearing a more or less extended meaning, the rule requires that meaning to be allowed to them which is least beneficial to the covenantor": *Airey v. Merrill*, 2 Curt. 11. And Mr. Chief Justice Gibson, in *Atwood v. Reliance Transportation Co.*, 9 Watts, 88 [34 Am. Dec. 503], in relation to a restriction in a contract by a carrier, said: "Though it is perhaps too late to say that a carrier may not accept his charge in special terms, it is not too late to say that the policy which dictated the rule of the common law requires that exceptions to it be strictly interpreted, and that it is his duty to bring his case strictly within them." And such is the well-settled rule of construction in such cases.

The contract of defendants is not merely to forward the bullion, but to "forward to San Francisco and deliver to address." They are not merely to start it upon the way by some suitable conveyance, but are to see that it reaches its destination, and are to "deliver to address." They were undoubtedly common carriers, and not forwarders in the technical sense of the term. But there was an evident intention on the part of defendants to restrict their liability, and although

they were acting in the capacity of carriers, they stipulated that they were "not to be responsible except as forwarders." As we construe this clause, it does not mean that defendants would start the package upon the way by some suitable conveyance, and that thereupon their responsibility should cease, for that would be directly in conflict with the covenant to "deliver to address." It simply means, that defendants would not assume the extraordinary responsibilities of a common carrier, and become an insurer of the goods, except as against loss resulting from the act of God or public enemies. There is no express covenant or exception against loss by negligence on the part of defendants, or of those employed by them in the transportation of their express matter. The exception fixes the limit of responsibility by referring to another class of bailees, whose responsibilities are different from those of carriers; and the meaning, as we construe the restrictive clause, is, that they will be governed in respect to their liabilities by the same principles as those applicable to forwarders. It is manifest that it was not intended by this clause that all responsibility should cease as soon as the package was started upon its passage from the office of defendants at Los Angeles; for the receipt also contains the clause, "in no event to be liable beyond our route as herein receipted." The route as therein receipted extended to San Francisco. The printed form of the instrument used in this case was evidently framed with a view to general use, where the point of destination was beyond, as well as within the routes established and used by defendants. Evidently it was contemplated that defendants might be liable for a loss occurring on their "route." If it was intended to release themselves from all responsibility while the package should be in transit, this clause would doubtless have been made to read, "in no event to be liable for any loss arising after leaving our office at Los Angeles," or some other language of equivalent import. The defendants were carriers, and the bullion was lost while in their possession in the character of carriers. It was not received to be stored, or to be started upon its passage merely by the first convenient opportunity; but to be carried and delivered "to address," and for no other purpose. There was no point at which defendants were in fact mere forwarders, in the technical sense of the term, or in which they were warehousemen. The goods were never in their possession in such character, but in the character of carriers only. They could not be

liable in a character which they never occupied; and their contract that while they are carriers they shall only be liable "as forwarders," in connection with the other language of the instrument, can only mean that the liability shall be governed by the principle of law applicable to forwarders; that is, that they shall only be liable for losses arising from a want of ordinary care on the part of themselves, and in the agencies made use of by them in the exercise of their ordinary business of carriers.

The word "as" is defined in the last edition of Webster's dictionary as follows: "Like; similar to; of the same kind, or in the same manner; in the manner in which." And this is obviously the ordinary import of the word standing in relations similar to that in the instrument under consideration. Defendants' liability was to be "similar to" that of forwarders, — "of the same kind." They were to be liable "in the same manner" — "in the manner in which" — forwarders are liable. In what manner are forwarders responsible? Of what kind is their liability? They are not insurers, like carriers, but they are liable for losses of goods while in their custody resulting from negligence of themselves and those whom they employ in their business of forwarders. And if a forwarder or warehouseman, instead of using his own warehouse, and employing his own subordinates, should, for a stipulated sum paid to the owner, use in his business the warehouse of another person who employs and controls the subordinates, there can be no doubt that he would be liable for a loss of the goods intrusted to his care, occurring while in his possession, and resulting from the negligence of such subordinates, although not under his control. If the liability of these defendants under their contract is to be "similar to" that of forwarders, if it is of "the same kind," if they are to be responsible "in the same manner," then they are liable for any loss resulting from the negligence of themselves, or negligence in the agencies employed by them, while the bullion was in their custody and control; and that custody, without doubt, continued up to the moment of the loss, and would have continued but for the loss up to the time when it would have reached its destination, and been delivered "to address." The fact that defendants made use of various public conveyances, their messenger with the treasure traveling a part of the way by stage, a part by steam-tug and lighters, and a part by ocean steamer, makes no difference as to their liability. For defendants' purposes, the

managers of those various conveyances were their agents and employees. Defendants had the means of holding the proprietors of those various vehicles used in their business of expressmen responsible to them had they chosen to do so. If they did not take the proper means to secure themselves, it was their own fault. The defendants, although employing public conveyances, were still carriers having the actual custody and management of the treasure during the transit, as well as while it remained at the office of defendants at the extremities of their route. Ritchie, the messenger of the defendants, was in the actual custody of the treasure during the transit. Suppose by the carelessness of Ritchie in transferring the treasure from the steam-tug to the Senator, it had been dropped into the ocean and lost, can it be pretended that the defendants would have been exempt from liability under the restrictive clause of their contract under consideration? Would it be claimed, in such case, that the liability of defendants ceased as soon as the treasure left their office at Los Angeles? We do not think any such construction would be claimed for the stipulation. If the defendants would not be protected by the exception against loss from the negligence of one of their servants, why should it protect them against the negligence of another, who, as to the same matter, is in law their servant or agent. Both are, in contemplation of law, the agents or employees of defendants, and the acts of both are the acts of defendants, and the language of the restrictive clause under consideration no more excludes the liability resulting from the negligence of one than from that of the other.

The defendants were common carriers, but under the contract they were carriers with limited responsibilities. There is an ample margin for the operation of the clause restricting the defendants' liability in the numerous accidents and losses not arising out of negligence or malfeasance, and not even comprehended in the exception, "damages arising from the dangers of railroad, ocean or river navigation, fire," etc., against which the carrier is an insurer, and from which forwarders are exempt.

Much stronger language has been held not to exempt bailees from losses arising from negligence. To justify the conclusion that such exemption is contemplated, the language should be unequivocal, and susceptible of no other reasonable interpretation. In *Wells v. Steam Nav. Co.*, 8 N. Y. 375, the contract for towing a vessel from New York to Albany contained the

clause "at the risk of the master and owners thereof." Although persons engaged in towing vessels have, in New York, been held not to be common carriers, the defendants in that case were still held to be liable for damages resulting from the carelessness of those engaged in towing the vessel, notwithstanding this restriction in their contract. Mr. Justice Mason said: "I cannot think the expression contained in it, 'at the risk of the master and owners thereof,' was understood by the parties as a protection against all kinds of negligence. It would be an extraordinary contract which should in express terms give such a latitude in performing a kind of service of so important a character as the one under consideration; and to permit a contract to have so unreasonable an effect as it would imply, the intention of the parties should be clearly and unequivocally expressed, so as to leave no room for doubt or misconstruction: *Schieffelin v. Harvey*, 6 Johns. 180 [5 Am. Dec. 206]; *Alexander v. Greene*, 7 Hill, 547. In this contract, nothing is said about negligence" (page 379). In the same case, Mr. Justice Gardiner, referring to *Alexander v. Greene*, 7 Hill, 544, said (page 382): "We held, then, if a party vested with a temporary control of another's property for a special purpose of this sort would shield himself from responsibility, on account of the gross negligence of himself and servants, he must show his immunity on the face of his agreement; and that a stipulation so extraordinary, so contrary to the general custom and the understanding of men of business, would not be implied from a general expression, to which effect might otherwise be given,"—and that he saw no reason now for changing this rule. So also in *Schieffelin v. Harvey*, 6 Johns. 180 [5 Am. Dec. 206], where goods shipped to England were "returned to the shippers at their own risk," and were purloined from the ship, the owner of the ship was held liable. The court say: "It is undoubtedly true that the general operation of law may be controlled by the agreement of the parties. But such agreement ought to be clear, and capable of but one construction, unequivocally and necessarily evincing that such was the intention of both the parties." A similar rule is stated in *Beckman v. Shouse*, 5 Rawle, 189. As further instances of the application of the rule to restrictive clauses in the contracts of carriers, see *Sager v. Portsmouth, S. & P. & E. R. R. Co.*, 31 Me. 238, 239 [50 Am. Dec. 659]; *De Rothschild v. Royal Mail Steam Packet Co.*, 7 Ex. 734.

So, also, in the case of the *New Jersey Steam Navigation*

Company v. Merchants' Bank, 6 How. 344, in the supreme court of the United States, the contract provided that, "the following conditions are stipulated and agreed to as part of this contract, to wit: The said crate, with its contents, is to be at all times exclusively at the risk of the said William F. Harnden; and the New Jersey Steam Navigation Company will not, in any event, be responsible either to him or his employers for the loss of any goods, wares, merchandise, money, notes, bills, evidences of debt, or property of any or every description, to be conveyed or transported by him in said crate or otherwise, in any manner in the boats of the said company. Further, that the said Harnden is to attach to his advertisements to be inserted in the public prints, as a common carrier exclusively responsible for his acts and doings, the following notice, which he is also to attach to his receipts or bills of lading, to be given in all cases for goods, wares, and merchandise, and other property committed to his charge, to be transported in said crate or otherwise:—

"Take Notice.—William F. Harnden is alone responsible for the loss or injury of any articles or property committed to his care; nor is any risk assumed by, nor can any be attached to, the proprietors of the steamboats in which his crate may be and is transported, in respect to it or its contents, at any time."

Mr. Justice Nelson, in construing this contract, says (page 383): "The language is general and broad, and might very well comprehend every description of risk incident to the shipment. But we think it would be going further than the intent of the parties upon any fair and reasonable construction of the agreement were we to regard it as stipulating for willful misconduct, gross negligence, or want of ordinary care, either in the seaworthiness of the vessel, her proper equipments and furniture, or in her management by the master and hands. . . . If it is competent at all for the carrier to stipulate for the gross negligence of himself and his servants or agents in the transportation of the goods, it should be required to be done, at least, in terms that leave no doubt as to the meaning of the parties."

To apply these principles to the case in hand, we think it cannot be said that the contract in question, in clear and unequivocal terms, necessarily evinces an intention on the part of both parties, or of either party, that defendants shall be exonerated from any loss resulting from negligence in the agen-

cies employed by them in the transportation of treasure committed to their care. If such had been the intention, it certainly could, and doubtless would have been, expressed in language about which there could be no misapprehension by either party. Nothing is said about negligence. The language used is not such as necessarily expresses, or as men would ordinarily employ to express, the idea now claimed for it, and if so used, it would be likely to mislead a party to whom it is tendered ready executed upon the receipt of his property for transportation. That plaintiff could not have understood the contract in the sense claimed for it by the defendants, seems in the highest degree probable, for it can scarcely be credited that a man of ordinary capacity and intelligence would commit so valuable a package to others to be transported a long distance, without supposing that somebody would be responsible to him for at least good faith and ordinary care during the transit. But if the construction claimed for the stipulation in question is to prevail, the defendants were neither responsible themselves for ordinary care, after the treasure left their office at Los Angeles, nor bound to take the measures prescribed by the statute to make the owners of the vessels used by them as a means of transportation responsible.

The language of the stipulation under consideration, at least, admits of the construction which we have given it; and to hold that the exception includes losses arising from negligence would, in our judgment, be to adopt a strained construction in favor of defendants, and to depart from its obvious import, while as we have seen the rule to be, the construction must be most strictly against the defendants.

Holding, as we do, that the exception in the contract, for the reasons stated, does not exempt the defendants from losses resulting from the negligence of those in charge of the steam-tug, it becomes unnecessary to determine the more difficult question, in the present state of the authorities, as to the power of common carriers by special contract to exonerate themselves from liabilities arising from the negligence of those employed by them in their business of carriers.

The instructions of the court, considered in connection with the instrument in evidence, are substantially in accordance with the views here expressed. We therefore find no error in them, or in refusing the instruction asked by defendants.

The damages alleged in the complaint are \$10,755, and

judgment is asked for that amount only. The verdict and judgment are for \$11,740.87. This exceeds the amount embraced within the issues. There is no provision in our practice act authorizing this court to allow an amendment to the complaint making it correspond with the verdict. The court below, before judgment, might have permitted an amendment so as to make the complaint correspond with the verdict; but this was not done. Upon consent of the respondent, the judgment may be so modified as to reduce the recovery to the amount claimed in the complaint.

Ordered, that respondent have fifteen days within which to file his consent in writing, that the judgment be modified so as to reduce the amount to the sum of \$10,755, and upon filing such consent in writing, the judgment will be modified in pursuance thereof. In default of filing such written consent, it is ordered that judgment may be entered reversing the judgment of the district court, and granting a new trial.

It is further ordered, that appellants recover their costs of appeal.

SANDERSON, C. J., rendered a dissenting opinion in the principal case, of which the following is a synopsis: The jury were instructed, in substance, that if the defendants were an express company, publicly engaged in the transportation of freight from one place to another for hire, they were in law common carriers, and subject to all the responsibilities of common carriers, except so far as they may have lawfully modified them by agreement, and that their responsibilities were wholly unaffected by the fact that they used other vehicles, vessels, or means of conveyance than their own, for the purposes of such transportation. That, as common carriers, the defendants could, by contract, limit the liability imposed upon them by the common law, to a certain extent; but they could not, by such contract, relieve themselves from the exercise of ordinary care in the discharge of their duties; and if the treasure was lost through their negligence, or the negligence of any of their agents, they were responsible for the loss, notwithstanding any contract to the contrary. That if the defendants shipped the treasure on board the *Ada Hancock*, and there was an explosion, occasioned by the negligence of the persons in charge of her, by which it was lost, they were liable, for the reason that by so shipping the treasure they made, so far as the test of their liability to the plaintiff is concerned, the *Ada Hancock* their vessel, and the persons in charge of her their agents, for the purpose of fulfilling the obligations of their contract with him, notwithstanding they may have had no authority in the management or control of the vessel, or those in charge of her. The court below did not undertake to construe the contract in question, or to determine whether by its terms the defendants had stipulated for exemption from liability for any loss which might result from the negligence of their agents, or any portion of them; but assuming such to be the true meaning and intent of the contract, in effect charged the jury that the contract was void upon grounds of public policy, so far as it attempted to protect the defendants against the negligence of their agents, whether such agents were in

their immediate employment and directly under their supervision and absolute government, or were the parties in charge of the various public conveyances used by them in transporting the treasure in question, and not directly in their employment, and in no respect under their control. Such is the theory upon which, as I understand the instructions, this case went to the jury. It is alleged that these instructions are erroneous, so far as they instruct the jury that the defendants could not, by contract, relieve themselves from liability for losses caused by the negligence of their agents, it being claimed that a common carrier may, by express agreement, circumscribe or limit his common-law liability so as to protect himself from the consequences of any act of negligence or wrong committed by any person or persons other than himself, notwithstanding such persons may be his agents, or, in other words, he may by express contract nullify the common-law doctrine of *respondent superior*; and that this was done in the present case by the terms of the receipt which was given by the defendants and accepted by the plaintiff.

It is insisted on the part of the plaintiff that the receipt for the treasure and the annexed conditions given by the defendants, and accepted by the plaintiff, does not establish a contract between them restricting the common-law liability of the defendants, because it does not appear to have been signed by the plaintiff, nor does it appear that he either read or was informed of its contents, or that he in any manner assented to its terms further than is implied by his acceptance and silence; and that therefore it, in contemplation of law, only amounts to a notice brought home to the plaintiff, to the effect that the defendants would not be responsible except as therein provided. It is well settled that, if it is to be regarded as a notice merely, notwithstanding it was brought home to the knowledge of the plaintiff, it did not relieve the defendants from any responsibility imposed by the common law for a loss of the treasure occasioned by their negligence or the negligence of their agents: *Sayer v. Portsmouth etc. R. R. Co.*, 31 Me. 228; *Wild v. Pickford*, 8 Mees. & W. 443; *Story on Bailments*, 4th ed., sec. 571. But the weight of authority seems to be that a receipt delivered and received under like circumstances amounts to a contract: *Parsons v. Monteath*, 13 Barb. 353; *Moore v. Evans*, 14 Id. 524; *Hoford v. Adams*, 2 Duer, 480; *Dorr v. New Jersey Steam Nav. Co.*, 11 N. Y. 485; *Wells v. New York C. R. R. Co.*, 24 Id. 183. The point is too well settled to admit of debate. It is also insisted on the part of the plaintiff that this contract, when properly construed, does not exempt the defendants from the liability sought to be enforced in this action. The instrument was prepared by the defendants without previous consultation with the plaintiff, who had therefore no choice in the selection of the terms employed. And it is well settled that the language creating the exceptions from liability in such cases must be strictly construed against the party in whose favor they are made. The language was introduced by the defendants for their benefit, and if it is susceptible of a more or less extended meaning, the rule of construction in such cases is to adopt that which is the least favorable to the party who is to be benefited thereby: *Munn v. Baker*, 3 Eng. Com. L. 339; *Airey v. Merrill*, 2 Curt. 8; *Atwood v. Reliance Trans. Co.*, 9 Watts, 88; *De Rothschild v. Royal Mail S. P. Co.*, 7 Ex. 734. The language to be construed is as follows: "Received, etc., . . . which we agree to forward, . . . and deliver. It is further agreed, and is a part of the consideration of this contract, that Wells, Fargo, & Co. are not to be responsible, except as forwarders, nor for any loss or damage arising from the dangers of railroad, ocean or river navigation, fire, etc., unless specially insured by them, and so specified in this receipt."

It is insisted by defendants that notwithstanding they were common carriers and received full compensation for the transportation of the treasure in question, their liability touching such transportation is reduced from that of common carriers to that of forwarding merchants by the foregoing language; or in other words, that their liability ceased when the treasure was placed on board the stage-coach at Los Angeles, en route for San Francisco by coach, steam-tug, and steamer, the same being the usual mode of public transportation between those places; and that thereafter the treasure was at the risk of the plaintiff until it reached the general agency of the defendants at San Francisco, where their responsibility again attached and continued until a delivery thereof to the address of the plaintiff. This contract must be read by the light of surrounding circumstances as disclosed by the evidence in the case. The defendants were engaged in the express business; that is to say, in receiving, carrying, and delivering, by sea or by land, treasure, goods, and packages for hire, in the care of their own messengers, but in vessels, conveyances, steamers, boats, and vehicles belonging to other parties, in no way connected or associated with the defendants in their express business, and ordinarily used by the public at large as the common and public mode of transportation and conveyance. In these vessels, etc., the defendants had no interest and no voice in their management, nor any authority or control whatever over the persons in charge of them, and were as powerless for the purpose of preventing negligence on their part as the plaintiff himself or any other stranger. But in their capacity as common carriers the defendants were liable for any loss resulting from a defective construction of these public conveyances, or a careless and negligent management of them by persons in charge of them. All these facts and circumstances were notorious and well known to the plaintiff, who had had previous dealings with the defendants in the line of their business. Viewed in the light of these circumstances, it is obvious upon a mere glance at the contents of the instrument that it was designed to place a restriction upon the common-law liability of the defendants. And I think this has been done in language which every business man would find no difficulty in understanding. They agree to transport the treasure to San Francisco, and deliver it to the address of the plaintiff, who, on his part, agrees to pay them the sum of \$80.65, and in part consideration relieve them from all liability for any loss or damage for which common carriers are, but mere forwarders of goods are not, responsible. A forwarder is one whose business it is to receive and forward goods by the usual modes of transportation to their place of destination. He discharges himself from liability by showing that he has used ordinary diligence and prudence in forwarding the goods intrusted to his care by trustworthy and responsible parties engaged in the carrying business. His calling and the legal liabilities thereby imposed upon him are as well known among business men as that of common carriers and the liabilities imposed upon them by the law of the land.

We now come to the main question involved in this case, and which, so far as I am advised, is presented for the first time in this state. Counsel for the defendants affirm the broad proposition that a common carrier may by contract with the shipper protect himself against all liability for losses occasioned by the negligence, fraud, or felony of his agents or servants. That the defendants are common carriers, and that their common-law liabilities are wholly unaffected by the fact that they use means of conveyance not belonging to them or under their control or management, are propositions not denied by them. They fully concede that aside from the contract they would, under the law and the facts of this case, be liable for the loss of the treasure in

question; but they insist that they are relieved from that liability by the express terms of the contract of shipment made with the plaintiff. On the part of the plaintiff it is contended that the contract in question is a contract by the defendants against actual negligence and fraud of themselves, their servants, and agents, and therefore void upon grounds of public policy. Thus the question as to what extent a common carrier may, by express contract, restrict his common-law liability, is clearly and fairly presented by the record. That a common carrier may stipulate for exemption from liability for losses not resulting from any fault or negligence on his part, or on the part of his agents, notwithstanding much controversy heretofore, may now be regarded as well settled. By the common law he is absolutely liable for the safety of the goods intrusted to his care; and is responsible for injuries or losses arising from the acts of others, without any neglect or fault on his part, except such as arise from the "acts of God, the public enemies, or the fault of the party complaining." His liability is of two kinds; one is the liability of a paid bailee, and is for losses resulting from neglect on his part, or on the part of his agents; the other is that of an insurer, and is for losses resulting from accident or other unavoidable causes, without any fault on his part or on the part of his agents. Against this latter liability it is now well settled, both in England and America, that he may protect himself by contract with the shipper of the goods; for no principle of public policy can be contravened by a contract which merely exempts him from liability for losses which have not been occasioned by any neglect or fault on his part, or on the part of those for whose acts the law holds him responsible. Whether he may go beyond this is a mooted question, for it is claimed by the defendants that there are cases both in England and America which seem to sustain to its full extent the doctrine for which they contend.

His honor reviewed *Austin v. Manchester etc. R'y Co.*, 70 Eng. Com. L. 453, and *Carr v. Lancashire etc. R'y Co.*, 14 Eng. L. & Eq. 340, and considered them insufficient to support the theory of defendants. So the learned justice, after commenting at length upon *Wells v. New York Cent. R. R. Co.*, 24 N. Y. 181, *Perkins v. New York Cent. R. R. Co.*, 24 Id. 196, *Smith v. New York Cent. R. R. Co.*, 24 Id. 222, and *Bissell v. New York Cent. R. R. Co.*, 25 Id. 442, concluded that the most that could be said for these cases was that they established the doctrine in New York that a railroad corporation might by express contract exempt itself from all liability for the negligence or misconduct of its subordinate servants and agents, leaving, however, undetermined, the question whether there are not certain agents so directly and immediately connected with the corporation that a contract relieving it from liability for their negligence would be illegal (see case last cited, page 446), which, it must be confessed, is not a very clear or satisfactory condition in which to leave so important a principle; and, said the chief justice, it admits of serious doubt whether, after all the discussion had in those cases, there is any common ground upon which a majority of the court stand. Regarding them, however, as establishing the doctrine that a common carrier may contract against the negligence of his immediate agents, I think them opposed to principle and the weight of authority in America, and am not disposed to follow them. On the contrary, in my judgment, a contract exempting a common carrier from liability for losses to property, or injuries to persons, resulting from the negligence of their agents, is null and void, upon grounds of public policy, irrespective of the question whether the transportation be gratuitous or for hire: See authorities cited in respondent's brief. But in applying this principle a distinction is to be made between agents, as whether

they are immediate or remota. By the former, I mean such as are directly employed by the party sought to be charged, in his business exclusively, and are of his own selection paid by him, and in all respects subject to his will. By the latter I mean such as are made his agents, not by contract directly between him and them, but by operation of law merely; or, in other words, persons not directly selected and employed by him, and not in any respect under his control, but who nevertheless are in law considered as his agents, and for whose acts he is held responsible, notwithstanding they are in fact selected, employed, and paid by and owe obedience to other parties who have no concern in his business, and are in no just sense subordinate to him. Against the negligence of this latter class the common carrier may, in my judgment, protect himself by contract without violating any principle of public policy, but as against the negligence of the former he cannot. As to the former, the carrier occupies the position of a principal in fact as well as law, and the true reason upon which the doctrine of *respondet superior* is founded exists; but his relation to the latter is not strictly that of a principal, and the maxim, *Qui facit per alium, facit per se*, does not apply in any just sense. On the contrary, as to their acts, he occupies a position analogous to that of an insurer only, and there is therefore no rule of public policy which precludes him from protecting himself by express contract against the risk of their acts.

It cannot be claimed with any show of reason that negligence on the part of persons in charge of public conveyances, such as railroad trains, steamers, and stage-coaches, is induced by a contract between two strangers to the effect that one will and the other will not take upon himself the risk of their conduct in respect to the transportation of a particular shipment of goods. The transaction is too remote, and can possibly have no bearing or effect upon the conduct of the parties in question. To say that the persons in charge of the *Ada Hancock* were less careful in the performance of their duty by reason of the contract between the plaintiff and defendants, of which they knew nothing, is to assert a proposition which is contrary to reason. Had the treasure been lost through the negligence of Ritchie, the defendants' messenger and immediate agent, or any other agent directly employed by them in their express business, the defendants would have been liable, notwithstanding any contract to the contrary, upon grounds of public policy. But the defendants may lawfully contract, as I understand them to have done, in effect, in the present case, for indemnity against losses resulting from defects in the public conveyances used by them in the prosecution of their business, and against the negligence of the persons having such conveyances in charge, without violating any principle of public policy. Such losses are not the result of their fault or neglect within the true intent and meaning of the rule invoked by the plaintiff.

The business in which the defendants are engaged, and the mode in which it is transacted, are of comparatively modern growth, and had no existence at the time when the rule in question became a part of the common law; and the new conditions presented by their use of remotes, or so to speak foreign, agencies in the transaction of their business, do not, in my judgment, fall within either the letter or spirit of that rule. The question is simply as to which of the contracting parties shall assume the risk of loss which may or may not result from the negligence of other parties over whom neither has any authority or control. In its determination the public can have no possible concern, for whichever way it may be decided, the decision can have, in the nature of things, no effect whatever either by way of inducing or pre-

venting the negligence in question. Nor is there any force in the suggestion that by holding such contracts valid the shipper will be placed at the mercy of the carrier. He is not bound to make the contract. On the contrary, he may insist that the carrier shall receive his goods upon the terms and conditions imposed by the law of the land, and the carrier cannot refuse to take them without subjecting himself to an action. My conclusion is, that the case was not tried in the court below upon the proper theory, and that the judgment ought to be reversed and the case remanded.

RULES OF LIABILITY OF COMMON CARRIERS AND OF FORWARDING AGENTS ARE NOT ALIKE: *Maybin v. South Carolina R. R. Co.*, 64 Am. Dec. 753.

COMMON CARRIERS ARE INSURERS, ETC.: See *Welsh v. Pittsburg etc. R. R. Co.*, 75 Am. Dec. 490, and collected cases in note 497; *Arnold v. Jones*, 82 Id. 617.

COMMON-LAW LIABILITY OF COMMON CARRIERS MAY BE LIMITED BY EXPRESS CONTRACT: See collected cases in notes to *Kimball v. Rutland etc. R. R. Co.*, 62 Am. Dec. 573; *Cooper v. Berry*, 68 Id. 480; *Welsh v. Pittsburg etc. R. R. Co.*, 75 Id. 498.

COMMON CARRIER MUST SHOW THAT LOSS IS WITHIN EXCEPTED STIPULATIONS: See collected cases in notes to *Western Trans. Co. v. Newhall*, 76 Am. Dec. 776; *Steele v. Townsend*, 79 Id. 57; *Graham v. Davis*, 62 Id. 294.

LIABILITY ON CONNECTING LINES OF CARRIERS: See collected cases in notes to *Hart v. Rensselaer etc. R. R. Co.*, 69 Am. Dec. 450; *Kyle v. Laurens R. R. Co.*, 70 Id. 234; *Perkins v. Portland etc. R. R. Co.*, 74 Id. 512. This question is discussed at length in the note to *Wells v. Thomas*, 72 Id. 231-247.

AMENDMENTS AFTER APPEAL: *Rew v. Barker*, 14 Am. Dec. 515, and note 516-518; note to *Stevenson v. Mudgett*, 34 Id. 158-162; *Miles v. Vanhorn*, 79 Id. 477; *Haverhill Ins. Co. v. Prescott*, 80 Id. 123.

THE PRINCIPAL CASE WAS CITED IN each of the following authorities and to the point stated: An express company that receives and agrees to transport goods from one designated place to another for a compensation, in the ordinary means of conveyance, is a common carrier, although not the owner of or having no interest in the conveyance by which the goods are transported: *United States Ex. Co. v. Backman*, 28 Ohio St. 151. In *McLean v. Burbank*, 11 Minn. 291, the defendants were a stage company and common carriers of passengers from La Crosse to St. Paul; the ferry at which the accident happened was on, and constituted part of, the route taken by the defendants; they were not the owners of the ferry, but paid ferriage, and the coach in fact passed over the ferry; the plaintiff's intestate was a passenger, having engaged and paid the usual fare for one seat and passage in the coach from La Crosse to St. Paul; there was no notice to the passengers of the intervention of any other carrier than the defendants; and it was held, under this state of facts, that as to the passengers the ferry company were the employees and agents of the defendants, and that the latter were responsible for the acts of the ferry-man or ferry company, the same as for any other of their employees or agents. So, in the supreme court of the United States, the same doctrine is announced. A common carrier who undertakes for himself to perform an entire service has no authority to constitute another person or corporation the agent of his consignor or consignee. He may employ an agency, but it must be subordinate to him, and not to the shipper, who neither employs it, pays it, nor has any right to interfere with it. Its acts become the carrier's, because done in his service, and by his direction. Therefore, where an express company engages to transport packages, etc.,

from one point to another, sends its messenger in charge of them on the car set apart for its use by the railroad company employed to perform the service, the railroad company becomes the agent of the express company; and an exception in the latter's bill of lading "that the express company is not to be liable in any manner, or to any extent, for any loss or damage or detention of such package, or its contents, or of any portion thereof, occasioned by fire," while it will exempt the express company from responsibility for loss by fire, caused by the acts or omissions of all persons who are not agents or agencies for the transportation, will not exempt such company from liability for the loss of such package by fire, if caused by the negligence of the railroad company to which it had confided a part of the duty it had assumed: *Bank of Kentucky v. Adams Ex. Co.*, 93 U. S. 186, where the principal case is summarized and approved. An amendment of pleadings should be allowed at any stage of the trial when it is necessary for the purposes of justice, and if not done it is error: *Farmers' Nat. G. Bank v. Stover*, 60 Cal. 396. Unimportant citations of the principal case were made in *Cassack v. Phoenix Ins. Co.*, 28 Id. 631; *Grace v. Adams*, 100 Mass. 506.

PEOPLE v. BATCHELDER.

[27 CALIFORNIA, 69.]

RELATIVE RIGHTS OF OCCUPANCY OF ISLAND FOR GATHERING EGGS OF WILD

BIRDS. — Persons who casually and temporarily occupy an island, a part of the public domain, not for purposes of husbandry, residence, or commerce, but to engage in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, have no such possession of the same as will entitle them to exclude others who wish to occupy it for a similar purpose, or justify them in forcibly resisting others who attempt to land upon it to engage in the same pursuit.

HOMICIDE, TO BE JUSTIFIABLE, must be in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein.

BARE FEAR OF OFFENSES WHICH WILL JUSTIFY HOMICIDE is not enough to justify a killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge.

IF ONE PERSON KILL ANOTHER IN SELF-DEFENSE, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and that the person killed was the assailant; or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given.

JUSTIFIABLE HOMICIDE. — Where several persons are on an island, a part of the public domain, engaged in gathering the eggs of wild birds deposited there, and others attempt to land there to engage in the same pursuit, and their attempt to land is forcibly resisted by the party first on the

island, the party seeking to land are justified in using the necessary force to effect their object; and if one of the shore party is killed, in doing this, by the party attempting to land, it will be justifiable homicide.

SAME—EFFECT OF KILLING PARTY BEARING ARMS.—Where several persons are on an island, a part of the public domain, engaged in gathering the eggs of wild birds deposited there, and other persons attempt to land there to engage in the same pursuit, the fact that the party attempting to land are armed with guns does not affect their right to land; and if they are attacked by those on shore with deadly weapons and murderous intent, and their lives placed in danger, they are not obliged to retreat, but may stand their ground, and if need be kill their assailants.

THE facts are stated in the opinion.

Van Arman, Lane, and Howe, for the appellant.

J. G. McCullough, attorney-general, for the people.

By Court, CURREY, J. The defendant was indicted by the grand jury of the city and county of San Francisco, for the crime of manslaughter in the killing of Edward Perkins at the Farallone Islands, on the 4th of June, 1863. The defendant pleaded not guilty, and was afterward tried and convicted and sentenced to be imprisoned in the state prison for one year. From this conviction and judgment he has brought the case to this court upon a statement embodying all the testimony produced on the trial, in which is contained the charge of the court to the jury, and also certain requested instructions on the part of the defendant, which the court refused to give to the jury, together with the exceptions taken by the defendant to various rulings during the progress of the trial.

The evidence discloses that on the 3d of June, 1863, the defendant and some twelve or fifteen other persons repaired in vessels to the anchorage adjacent to the principal of the Farallone Islands, situated about thirty miles westward from the city of San Francisco, and there remained during the night of that day; that on the morning of the next day, between six and seven o'clock, a portion of this party attempted to land upon the island, when they were met at the shore by a guard armed with guns, who, by words, accompanied by menacing acts, warned them not to land. Upon thus being warned and threatened, the party so attempting to go on shore returned to their companions upon the vessels at anchor, where they were joined by all, or nearly all, the defendant's party, and were furnished with loaded guns; and the party, thus re-enforced and equipped, made another attempt to land at a point upon the island, a short distance from where the guard on shore were.

Upon nearing the land, the shore party confronted them, and again warned them off, but notwithstanding they were thus warned, the defendant's party continued to approach the island, for the purpose of landing thereon, when the shore guard opened fire upon them, which was immediately returned by a volley from the defendant's party, who were together in a boat. The shore party fired several shots after the first round, when the defendant's party retreated. By the first fire from the men on shore several persons were wounded, one of whom subsequently died, and by the fire from the defendant's party one of the shore guard, Edward Perkins, was killed.

The object which the defendant and his companions had in visiting the Farallone Islands was to gather the eggs deposited there in great abundance by wild sea fowls. Before the time of the collision which resulted in the death of Perkins and another, a number of persons known as the Farallone Egg Company had been engaged in procuring the eggs deposited by the wild sea birds upon this island and selling the same in the San Francisco market; and the shore party, of whom Perkins was one, were in the employment of this egg company. It appears from the testimony of some of the persons composing the shore party that their chief business was to guard the island for the benefit of the egg company, against the ingress of any other persons who might desire to visit it for the purpose of gathering eggs there. The egg company, it seems, claimed the exclusive right of gathering wild birds' eggs upon the island, as the prior occupants of it for that purpose. The defendant refused to acknowledge any such right, or to yield to such claim, and in attempting to avail himself of what he deemed a right common to all citizens, he met with resistance from an armed force, who assumed to be acting in the defense of what they claimed as their employers' prior and paramount right. Upon the trial of the defendant, the question as to the right of the respective parties to occupy the island for the object of procuring the eggs deposited there by sea fowls was in some degree involved, and the further question as to whether the defendant and his party were acting in the necessary defense of themselves, when the deceased, Perkins, was slain, was also a legitimate subject of inquiry.

When a person is accused of a criminal homicide, and in his defense undertakes to justify himself on the ground that the person slain was the aggressor, and that his death was the result of force used in the necessary defense of the person of

the accused, then the character of the conduct of the deceased, with the concomitant circumstances, as well as that of the accused, is a proper subject of investigation. While courts and juries should be extremely cautious how they excuse the slayer of his fellow upon the pretext that the act was the result of a necessity, they should be equally careful not to find the accused guilty, if it appears that the homicide was committed in the necessary defense of himself, or in the defense of those whom he is bound by natural law to protect and defend.

In charging the jury, the court left it to them to determine from the evidence whether the deceased and those acting with him were, at the time of the fatal rencounter, in the actual possession of the place where the defendant and his party attempted to land, and whether the defendant and his party had actual notice of such possession, and also whether he or they attempted at the time to forcibly enter and intrude into and upon such possession.

We have examined the evidence in the record with care, and have not been able to find anything therein from which it could be inferred even that the deceased and those engaged with him in resisting the landing of the defendant and his party, or their employers, were in the actual possession of the place at which the defendant's party attempted to land, or had the right to prevent any persons who desired to land upon the island from doing so, or from engaging, in a peaceable manner, in the lawful business of gathering the eggs deposited there by the wild birds of the ocean. Both on the part of the prosecution and defense it seems to have been conceded on the trial that the island was a part of the public domain of the United States, and it is not pretended that the Farallone Egg Company, or their servants, the armed guard, of which the deceased was one, had reduced the island, or any portion of it, to actual and exclusive occupation for the uses and purposes of husbandry, residence, or commerce. We are not disposed to extend the doctrine which recognizes the actual possessor of land for the uses to which land is ordinarily employed, as its owner, to the casual and temporary occupant, whose use of it is subordinate to the pursuits of hunting and fishing, or the gathering of the eggs of birds whose resting-places are upon the islands of the sea. It would be equally reasonable to recognize in the hunter who had first penetrated the mountain wild in quest of game the exclusive right to it as his hunting ground, as it would to accord to the Farallone

Egg Company the right to the exclusive possession of the Farallone Islands, or any one of them, for the business of gathering eggs left there by wild birds. The defendant and his party had the right to enter upon the island, provided the government in the legitimate exercise of its proprietary and sovereign authority made no objection; and we cannot but regard the resistance made by the shore party, of which the unfortunate deceased was one, to the landing of the defendant and his companions, as unwarranted by any principle of right and justice. Hence, the fact that others were on the island for the purpose of gathering the wild birds' eggs there, at the time defendant attempted to land, did not impair in any degree his right to land and engage in the like business, nor justify such other persons in resisting the defendant's landing; and the court ought to have so charged the jury when requested on the part of the defendant.

The court was requested, on behalf of the defendant, to give certain instructions to the jury, some of which were given and others refused. Of those refused was the following, among others, which is in these words:—

“The fact that the defendant and others were armed with guns at the time of landing on said island did not, of itself, render the landing unlawful, or justify the deceased and others in resisting such landing or attacking them while so landing. Therefore, if the jury find from the evidence that defendant and others armed with guns, while landing on said island were attacked by deceased and others with deadly weapons, and their lives placed in immediate danger, and that the fatal shot was fired by one of the party with defendant, under such circumstances and in necessary self-defense, it is justifiable homicide, and the jury ought to acquit.”

The evidence in the case did not show who fired the shot by which Perkins was killed, and the court, in its general charge to the jury, instructed them that in order to convict the defendant it was not necessary that the evidence should show that the deceased was killed by a deadly weapon or gun discharged by the accused, but that it was enough if the evidence showed him to be an accessory to the unlawful killing; and in connection with this the court clearly and accurately defined the character of an accessory. The requested instruction here set forth *in hæc verba* proceeded upon the hypothesis that the fatal shot was fired, not by the defendant himself, but by one of his party after being attacked by the deceased and those

with him, and that the deceased was slain in necessary self-defense.

The act of bearing arms did not of itself affect the right of the defendant and his companions to land upon the island, nor justify the resistance and attack of the shore guard. The law justifies the individual who slays his adversary in his own necessary self-defense. The instruction as requested states as a postulate the true rule of law as applied to certain facts and circumstances assumed to have existed, and then declares further, that if the jury should find from the evidence that the lives of the defendant and his companions were placed in immediate peril by the attack of the guard on shore, armed as they were with deadly weapons, and that the homicide was committed in the necessary self-defense of the lives of those so attacked, then such defense was justifiable.

The defendant also requested the court to charge the jury in the following words: "The fact that defendant and those with him, on the occasion of the alleged homicide, were armed with guns at the time of landing on said island (if the jury should be satisfied of such fact from the evidence), does not render the act of landing illegal, nor justify the deceased and those on the island with him in resisting such landing, or in attacking them while landing. Therefore, if the jury shall find from the evidence that defendant and those who were with him while attempting to land on the island on the occasion of the homicide were attacked with deadly weapons and murderous intent by the deceased, and his life placed in immediate danger, he was not obliged to retreat, but might stand his ground, and if need be kill his assailant."

This requested instruction, which was refused, as the one before considered, states as a basis a legal proposition exonerating the defendant and his party from the charge of an infraction of the law by the simple act of seeking to land on the island armed as they were, and at the same time involves the shore guard in the commission of a wrong in resisting such landing, and in attacking the defendant and his party while attempting to land; and then proceeds to inform the jury, if they should find that the defendant and his companions were attacked with deadly weapons and murderous intent by the deceased, by which the defendant's life was placed in instant peril, he was not obliged to retreat, but might at once act in his own defense, and if necessary slay his assailant.

Before the defendant had requested the court to so charge

the jury, they had been correctly instructed as to the law respecting justifiable homicide. The court had informed them that in order to make the killing of a human being justifiable, it must be in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against any person or persons who manifestly intend and endeavor, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. And the court had further instructed the jury that a bare fear of these enumerated offenses was not enough to justify the killing; but that it must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge; and also, that if one person kill another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and that it must appear, also, that the person killed was the assailant; or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given: Act concerning Crimes and Punishments, Laws of 1850, p. 232, secs. 29-31.

The requested instruction last set forth comprehends the essential circumstances on which the right of self-defense, in the given instance, arose and depended; viz., defense of the person of the accused against the attack of the deceased, having at the time the means in hand, which he was using with murderous intent against the defendant. If the jury had been instructed to find as to these facts, and had found them to be true, and also that by means of the attack the life of the defendant was in immediate danger, or, in other words, that the danger was urgent and pressing, it would have appeared that these circumstances were sufficient to excite the fears of a reasonable person, and the jury, in such event, would have been bound to have inferred, as a sequence legitimately deducible from these constituent elements, the absolute necessity of the defense which resulted in the homicide committed.

As appears from the charge given by the court to the jury, the law specifies, with careful particularity, the essential circumstances which must precede the existence of the right to

take life in self-defense. Whether the facts and circumstances developed by the testimony constituted a case of necessary self-defense was to be passed upon and determined by the jury from the evidence, considered in subordination to the law on the subject. It was their province and duty to ascertain from the evidence, and to determine as to the alleged necessity of the act which resulted in the death of Perkins; and it was the right of the defendant to have the question submitted to them in a distinct and palpable form to answer, by their verdict, whether the homicide was committed by the defendant, or any one of his companions, in his or their necessary self-defense; and it was also his right, if they should find the issue in this particular in his favor, to have the court instruct them that their verdict should be in justification of the accused.

Many other instructions were requested, on the part of the defendant, which the court refused to give to the jury. These it is not necessary to notice in detail, as what we have said is sufficiently comprehensive to embrace the various propositions embodied in the proposed instructions.

The judgment is reversed, and a new trial ordered.

SAWYER, J., dissented from the opinion delivered by the court in this case, and was of the opinion that the judgment rendered in the court below should be affirmed. I do not think, he said, that the right of possession of the Farallone Islands, or the right to gather the eggs deposited thereon by wild birds, was in question in this case. The right might have been to some extent in question had a party in possession been indicted for slaying one of a party seeking to enter with violence against his will. But men have no right to go with arms and enter with force, even upon their own land, against other parties already there, armed and violently, though wrongfully, resisting. In a contest arising under such circumstances both parties are in the wrong, and if it results in the loss of life, caused while the contest actually continues, the slayer cannot shield himself upon the ground of self-defense without at least first showing some disposition to decline further conflict. The charge covered all the points necessary to enable the jury to consider the case intelligently and render a just verdict. I think there was no error in refusing the charges asked on the part of the defendant, and refused. In my judgment, the two instructions selected and commented on in the prevailing opinion as the grounds of reversal, without qualification, must necessarily have misled the jury. They wholly omit to bring to the notice of the jury the question as to whether the defendant's party prepared with arms to overcome resistance were entering in a violent and hostile manner, knowing they would be resisted by men also armed for that purpose. The unlawful act of the shore party was not the only element to be considered, for the approaching party might also be seeking to enter in an unlawful manner, and the evidence tended strongly to show that they were. This element, as well as the unlawful act of the shore party, should also have been taken into account, as the founda-

tion of the legal proposition with which the instruction asked terminates. It cannot be said, as a legal proposition, under the circumstances of the landing shown by the evidence, that "the fact that defendant, and those with him on the occasion of the alleged homicide, were armed with guns at the time of landing on said island, does not render the act of landing illegal." And the instruction must be considered in the light of the testimony to which it was to be applied.

Thus considered, the jury would be in effect instructed that the defendant, up to the time of firing the fatal shot, was pursuing a lawful right in a lawful manner. Yet the testimony shows that defendant's party went there with the knowledge that the party of the deceased were on the island armed, for the purpose of resisting by force the landing of defendant and his associates; that defendant's party came prepared for a contest; that they first approached the island in a small boat, without arms; and that, having been warned not to land by men in arms, and that their landing would be resisted, they returned to their vessel, increased the party to the number of fifteen or twenty, armed themselves with guns, and returned prepared to overcome any resistance offered by those on shore; and that they advanced with loaded guns, protecting their persons while advancing by barricades, till after having been warned to stop without effect, a volley was discharged by the resisting party, which was immediately returned by the advancing party of defendant, and the deceased slain. The testimony as to which fired the first shot before the volley fired by the respective parties, is conflicting. To say that such mode of landing is not, as a legal proposition, unlawful, is more than I am prepared to do; and yet such is the effect of the instructions asked and refused when considered in connection with the evidence to which they were to be applied. A violent and forcible attempt to enter is none the less unlawful and wrongful, because the resistance is also unlawful. If to justify the homicide "it must appear," in the language of the statute, "that the slayer nam really and in good faith endeavored to decline any further struggle before the mortal blow is given," he will certainly not be justified in inviting an attack in a violent manner, with arms in his hands, and upon the attack being made, immediately slaying his opponent. His honor therefore thought the court was justified in refusing the instructions, and that the judgment should be affirmed.

HOMICIDE, JUSTIFIABLE WHEN: *State v. Thompson*, 74 Am. Dec. 342, and cases cited thereto 346; *Wesley v. State*, 75 Id. 62; *Roberts v. State*, 55 Id. 97; *Niles v. State*, 62 Id. 711.

HOMICIDE IN SELF-DEFENSE, WHAT MUST APPEAR TO JUSTIFY: *State v. Thompson*, 74 Am. Dec. 342, and note 346; *Wesley v. State*, 75 Id. 62, and note 69; note to *Dukes v. State*, 71 Id. 380; note to *Grainger v. State*, 26 Id. 279.

FEARS SUFFICIENT TO JUSTIFY HOMICIDE: See *Wesley v. State*, 75 Am. Dec. 62, and note 69; *Dupree v. State*, 73 Id. 422; *Dukes v. State*, 71 Id. 370; *Teal v. State*, 68 Id. 482; *Grainger v. State*, 26 Id. 278.

CASES
IN THE
SUPREME COURT OF ERRORS
OF
CONNECTICUT.

HOXIE v. HOME INSURANCE COMPANY.

[82 CONNECTICUT, 21.]

OBJECTION IS WAIVED WHEN MADE TO DEPOSITION which is inadmissible, but is admitted under an agreement that the objection might be reserved to the argument and then pursued if the party objecting saw fit, at which time no allusion is made to it, nor any ruling asked upon it.

EVIDENCE IS ADMISSIBLE AS TENDING TO SHOW a fraudulent combination to insure and lose vessels, to prove a fraudulent loss of a particular insured vessel by the direct misconduct of the master, and in this connection inquiry may be made respecting a series of losses under suspicious circumstances, of vessels owned by one of the same parties and mortgaged and insured in the same manner as the one lost.

UPON QUESTIONS OF KNOWLEDGE, GOOD FAITH, OR INTENT, evidence of any other transactions from which any inference respecting the *quo animo* may be drawn, is admissible.

WHERE FRAUD IS IMPUTED AND WITHIN ISSUE, provable by various circumstances, a considerable latitude must be indulged, in the admission of evidence.

FRAUD WHEN SET UP AS MATTER IN AVOIDANCE of a contract of insurance must be specially pleaded, and evidence thereof is not admissible without notice, under the Connecticut statute of 1848.

WHERE INSURER KNOWING VESSEL TO BE UNSEAWORTHY at the time of issuing the policy, elects to continue the risk and take the entire premium, and thereby induces the insured to rely on the policy as in force, he is stopped, after loss, from claiming that the policy did not attach because of the unseaworthiness of the vessel. But it is not sufficient that he "had reasonable means and opportunity of ascertaining the facts."

INSURED IS ENTITLED TO PRESUME SEAWORTHINESS of vessel insured. He is also entitled to presume that the insured knew the condition of his vessel when he applied for insurance, in the absence of proof either way. Therefore, in case of loss resulting from unseaworthiness known to the

insured at the inception of the risk, he is guilty of fraud in concealing the facts and claiming the loss, and is estopped from setting up a claim of waiver of unseaworthiness by the insurer.

WAIVER IS INTENTIONAL RELINQUISHMENT OF KNOWN RIGHT.—There must be knowledge of the existence of the right, and an intention to relinquish it.

THERE IS IMPLIED WARRANTY OF SEAWORTHINESS incident to time policies of insurance as well as to voyage policies, as such warranty is a necessary incident to all contracts of marine insurance.

AMOUNT OF PREMIUM PAID is not a factor to be considered in determining the degree of seaworthiness warranted by implication, in a time policy of insurance on a vessel.

ASSUMPSIT on a policy of insurance for the total loss of the bark *Nimrod*. The opinion sufficiently states the facts except the notice spoken of therein, and the objection as to the amount of premium. The notice is as follows, and was given after defendants pleaded the general issue: "And the plaintiff will take notice that the defendants will claim, and offer evidence on the trial of said cause to prove, that the said vessel was in an unseaworthy condition when she left St. Ann's Bay, and that the master and commander of the vessel negligently and imprudently continued his voyage after he discovered the leak in said vessel, and that it was his duty to have returned to St. Ann's Bay when he made such discovery; and that the vessel was lost by the fraud, covin, and evil practice of the master and commander." That portion of the charge objected to was as follows: "There are different degrees of seaworthiness, and in determining which degree was understood by the parties in a particular case, reference should be had to the existing circumstances, such as the age and build of the vessel, the nature of the service, the amount of the premium, etc."

Blackman and Doolittle, in support of a motion for a new trial.

Ingersoll and Ingersoll, contra.

By Court, BUTLER, J. 1. The first point made by the defendants is, that the questions and answers specified in the deposition of Captain Lane should have been excluded from the consideration of the jury. We are satisfied they were inadmissible, and should have been erased. But they were retained in consequence of the laches of the defendants, and neither the plaintiff nor the court committed any error. The defendants agreed that the objection might be reserved to the argument of the case, to be then pursued by them, if they saw

fit to pursue it. They did not then pursue it. Doubtless they agreed to the reservation under the impression that the surveys would be offered and might be admissible. But when they were offered, objected to, and withdrawn, we think it was the duty of the defendants to pursue the objection, and that unless they did so, the court and the plaintiffs might presume that the objection was waived.

2. In connection with evidence tending to show a fraudulent loss of the vessel by the direct misconduct of the master, the defendants offered to inquire respecting what they claimed to be an extraordinary series of losses, under suspicious circumstances, of other vessels owned by one of the same parties, and mortgaged in like manner to the plaintiff, and insured, as tending to show a fraudulent combination to insure and lose vessels, and therefore to procure the insurance from the defendants and others on this vessel with intent she should also be fraudulently lost. Whether the evidence was rightly excluded or not involves a twofold inquiry, viz.: 1. Was the evidence relevant? and 2. Was it admissible under the pleadings?

We are satisfied that the evidence was relevant. Upon questions of knowledge, good faith, or intent, any other transactions from which any inference respecting the *quo animo* may be drawn are admissible. And where fraud is imputed and within the issue, and provable by various circumstances, a considerable latitude must be indulged in the admission of evidence: *Benham v. Cary*, 11 Wend. 83. These principles would justify the admission of the evidence offered. It has sometimes been thought that the other transactions should be contemporaneous, or nearly so, but that is not essential. A fraudulent combination and fraudulent motive may be inferable from a series of successive transactions of a fraudulent or suspicious character, and in respect to such a subject-matter. In this case, if there had been a considerable number of vessels contemporaneously purchased, mortgaged, insured heavily, both vessel and freight, and by both owner and mortgagee, and lost suspiciously in moderate weather, some inference of fraudulent combination and intent as to all would be unavoidable. But a series of similar transactions effected in the same way by the same parties with the same result would excite the same suspicion, and induce the same inference. Indeed, the latter might be equally suspicious, because such a method of perpetrating such frauds is the most feasible, requiring less capital, a less number of conspiring captains to be trusted, is

less likely to be generally suspected, known, or remembered, and therefore as likely to be adopted. The authorities more or less applicable on this subdivision of the point are numerous, and may be found collected (including *Gardner v. Preston*, 2 Day, 205 [2 Am. Dec. 91], and *Treat v. Barker*, 7 Conn. 274) in note 333 of Cowen and Hill's edition of Phill. Ev.

But we are not satisfied that the evidence was admissible under the notice. It does not allege either an original fraudulent combination of the owners and of the plaintiff before the insurance was obtained, nor any connection with or assent to an intended loss by the fraud and evil practice of the master after the insurance was effected. The fraud of the master was barratry (notwithstanding he was part owner), and a peril insured against, unless the other owner or the plaintiff assented to it. It was essential to the intended defense, therefore, that either the original combination or the subsequent assent should be proved. The one goes to show that the contract, although *prima facie* valid, was void; the other, that the evil practice of the master, which was *prima facie* barratry, was not such, but the fraud of the other owner and the plaintiff also. And both were matter of avoidance, and should have been inserted in the notice. The action is *assumpsit* on an express contract, and doubtless under the rules of the common law as gradually relaxed from their original strictness, and existing prior to the statute of 1848, would be admissible under the general issue alone. But that statute changed the common law in that respect, and since its passage, fraud, if relied upon, must be set up. If there is an apparent distinction between fraud which goes to the original validity of the contract and fraud which operates in avoidance of it after its execution, that distinction is not real, and seems to be practically disregarded in the recent rules incorporated into the English practice; for those rules provide that "all matters of confession and avoidance, including not only those by way of discharge, but those which show the transaction to be void or voidable in point of law on the ground of fraud or otherwise, shall be specially pleaded," etc. So it is provided in the Irish act of 16 and 17 of Victoria, that "every defense which admits a contract in fact, but relies on matter of avoidance or discharge, or illegality on the ground of fraud," etc., shall be pleaded. The English rules and the Irish act therefore make no distinction between fraud before and after the execution of the contract. Here there was a contract in fact, and the evidence offered was

of a fraudulent conspiracy which affected the legality of a contract *prima facie* valid, and if not strictly matter of avoidance, it was clearly "consistent with the truth," in fact, "of the material allegations of the declaration," and therefore within the statute. And so, according to the construction given by us to the statute in the recent case of *Mahaiwe Bank v. Douglas*, 31 Conn. 170, the evidence of fraud was clearly matter of avoidance also, and within it. There we held the evidence admissible under the general issue, because it showed that the contract set up never was in fact executed by the defendant. Here the execution of the contract is conceded, and the defense should have been set up in the notice; and for that reason the testimony was rightfully excluded.

3. The court having charged, in conformity to the claim of the defendants, that there was an implied warranty of seaworthiness incident to a time policy, the plaintiff requested the court to charge in substance, that if, after the partial loss, the defendants, with knowledge or reasonable means and opportunity of ascertaining the facts, on consideration thereof elected to treat the policy as in force and continue the risk, and retain or appropriate the entire premium for the entire period, and the plaintiff had thereby been induced to rely on the policies as in force, the defendants would be estopped from claiming that the policy did not attach because of the unseaworthiness of the vessel. Irrespective of the alternative of "reasonable means and opportunity of ascertaining the facts," that request was a legal and proper one. If the defendants, knowing her to have been unseaworthy at the inception of the risk, elected to continue the risk and take the entire premium and thereby induce the plaintiff to rely on the policies as in force, they would have been as matter of law, and justly estopped. Such is the doctrine of the case of *Frost v. Saratoga Mutual Ins. Co.*, 5 Denio, 154 [49 Am. Dec. 234], and the other cases cited by the plaintiff. And if, by the introduction of the alternative, "or after reasonable means and opportunity of ascertaining the facts," the eminent and lamented counsel who tried the case for the plaintiff in the court below meant nothing more than that, when the information contained in the surveys was offered to the defendants, they, deeming the vessel then fully repaired and seaworthy, chose to waive inquiry and continue the risk whatever the fact respecting seaworthiness may have been at the inception of the risk, and acted and induced the plaintiff to act accordingly, perhaps

the request might be sustained. But the charge of the judge embodies a very different proposition. The import of it is, that an injury having been sustained confessedly by her unseaworthiness or the perils of the sea, if the defendants had means and opportunity for ascertaining whether by reason of unseaworthiness or not, they were bound then to inquire, and if they did not, and paid the damage and took the benefit of the premium note, or in other words, acted without inquiry, as if there had been no breach of warranty,—they waived all right to the benefit of such warranty, if they should afterwards learn that the vessel was unseaworthy at the inception of the risk, and was ultimately lost in consequence of it. That proposition cannot be sustained.

A waiver is the intentional relinquishment of a known right, and there must be both knowledge of the existence of the right and an intention to relinquish it. These defendants were entitled to presume, and rely on the presumption, that the plaintiff knew the condition of his vessel when he applied for the insurance, and that he concealed nothing, but made an honest contract. "And where there is no proof either way, seaworthiness is to be presumed": *Per Shaw, C. J., in Capen v. Washington Ins. Co.*, 12 Cush. 535. They were not therefore bound to inquire, and having no actual knowledge they waived nothing. Besides, the plaintiff claimed that the injury resulted from the peril of the seas. If it resulted from unseaworthiness which existed at the inception of the risk, he must be presumed to have known it, and therefore to have been guilty of fraud in concealing the fact and making the claim for the loss, and should be estopped from setting up that claim of waiver. We know of no authorities or analogies to sustain this part of the charge of the court.

The plaintiff seeks to avoid the effect of this error by claiming that there is in the law no implied warranty of seaworthiness incident to a time policy, and that therefore there was none in this case; that the ruling of the court on that point was erroneous; and that the defendants were not therefore prejudiced by the subsequent error in the charge, and substantial justice has been done. This claim of the plaintiff involves a question which has been quite recently raised and very much discussed in England, and also in the case of *Capen v. Washington Ins. Co.*, 12 Cush. 517, and is of very considerable practical interest.

That there is such an implied warranty in respect to voyage

policies, is conceded. It must also be conceded that such a warranty has been implied in respect to time policies, both in England and this country, from the time when they came in use until the question was raised in the recent case of *Gibson v. Small*, 4 H. L. Cas. 353, in the year 1848. In that case, it was holden in the queen's bench, in accordance with what had been universally received as law, that there was an implied warranty of seaworthiness in a time policy. The case was carried to the exchequer chamber, where the decision of the queen's bench was reversed; and was subsequently taken to the House of Lords, where the decision of the exchequer chamber was affirmed. By that decision it was settled as the law of England that a warranty could not be implied in respect to a time policy unless under special circumstances, but without indicating what the special circumstances were which would constitute any particular case an exception to the general rule thus established. Some of the judges intimated that if the ship was in the home port of the owner, and was bound upon a known voyage, and the policy covered a time extending beyond the contemplated voyage, the warranty should be implied. But when that precise case was subsequently presented in the queen's bench, in the case of *Thompson v. Hopper*, 34 Eng. L. & Eq. 266, that court refused to imply the warranty (Earle, J., dissenting), for the reason mainly that the House of Lords had holden that there was no such warranty as a rule, and that it was "expedient" that there should be none as an exception, and that the rule should be uniform and "inelastic."

When the case of *Gibson v. Small*, 4 H. L. Cas. 353, was before the House of Lords, the opinions of all the judges upon the question were called for and given; and we have deemed it important to look to those opinions as well as to the opinions expressed by the lords and in the court of queen's bench and exchequer chamber, upon the propriety of making such an innovation upon the law. A careful examination of them has failed to satisfy us that the change, if a correct one for that country, should be adopted here.

The warranty of seaworthiness is a necessary incident to the contract of marine insurance, for it involves a condition of the subject-matter absolutely essential to its fairness and honesty. The contract is one of indemnity against extraordinary perils, and it is necessarily implied that the vessel is or shall be able to endure the ordinary perils to which it may be exposed, and that ability constitutes seaworthiness. If it were

not so, if it were not in the contemplation of the parties that the ship was or should be capable of performing her voyage, the earning of the premium by the underwriter could not be contemplated, there would be no consideration for the contract, and the obligation would fail. Such was substantially the language of Lawrence, J., in *Christie v. Secretan*, 8 Term Rep. 198, and it was also said by Lord Mansfield that "the ship being capable of performing the voyage was the substratum of the contract of assurance." The doctrine involved in these dicta has frequently been recognized in England, and was expressly admitted by several of the judges in *Gibson v. Small*, 4 H. L. Cas. 353. One of them, however, Talfourd, J., did say: "It will be found on an examination of all the text-writers that the doctrine [of implied warranty] is generally based on the more limited consideration of the power of the owner to render his vessel seaworthy at the commencement of the adventure insured, and on the means of knowledge fairly attributable to him at the time of the contract." If such are the deductions of the English text-writers, they are clearly imperfect. Upon the question whether the rule should be a general one or not, and in determining its reasonableness, the fact that a knowledge of the condition of the vessel may fairly be attributed to the owner, and that it will be in his power to make her seaworthy in most cases, were undoubtedly taken into consideration. But the cause, "the substratum," which induced that consideration and the establishment of the rule, was the necessary implication that both parties must have contemplated the state of the ship when the risk was to begin as a seaworthy one. And that such is the nature of the contract and the foundation of the rule, has always been recognized by the courts of this country. In *Paddock v. Franklin Ins. Co.*, 11 Pick. 232, Judge Shaw cites approvingly the dicta of Lord Mansfield and Mr. Justice Lawrence, before referred to, and says that "the rule that the ship must be seaworthy at the inception of the risk is a necessary incident of the contract." Other similar citations might be made, and it would seem to be beyond dispute that the warranty of seaworthiness implied in a voyage policy is founded on the nature of the contract and the subject-matter of it, and the necessity of the case, and that it is implied in the law because it is as essential to any valuable right of the insurer under it that the vessel should be seaworthy as that she should be in existence at all.

Now, if such be the nature of the contract, and the necessity

for implying the warranty, why should it not be implied, as a rule, in time policies? or at least, when a knowledge of the condition of the vessel, and an ability to repair her, can be fairly attributed to the insured? We have looked through the opinions of the English judges for a satisfactory answer to this question, but we have looked in vain. Many of the judges and some of the peers admitted that in the latter case the analogy was perfect, and the warranty should be implied. But a majority were of opinion that the analogy would not hold in most cases, and several reasons were given by one or another of them. Two of these reasons only seem to require serious consideration. One of them was, that in most cases of time policies, the condition and situation of the vessel could not be known to the parties at the time of making the contract. This seems to have been assumed, and not controverted by the other judges, and it may be true in the commerce of that country; but if so, it must result from the fact that England has many and distant colonies, and very much of her commerce is to, from, and among them, and time policies are taken with a view to contingent deviations from one colony to another, which work a forfeiture in voyage policies. But it is not found or suggested that such a state of things exists here; nor have we any reason to believe that it is or will be so. We have no colonies; very much of our commerce is coastwise and internal, or direct from some port of our extended seaboard to and from some foreign port; communication by rail or telegraph with most of our ports is direct and speedy, and is not difficult by steamer directly or indirectly with the principal foreign ports, and it may well be assumed that in a large majority of cases where time policies are taken here, the ability to repair, and knowledge of the condition of the vessel, may fairly be attributed, and the analogy exist.

The other reason given is, that the analogy does not hold, because in a voyage policy the precise adventure insured is set out in the contract, and the degree of seaworthiness required may be definitely and clearly understood by the parties; whereas in a time policy, no cause of employment is set forth, and a warranty of seaworthiness would require the vessel to be fitted and equipped for any employment, and in any port of the world, and therefore, that it is unreasonable to imply the warranty. This argument evidently had weight with the court in *Capen v. Washington Ins. Co.*, 12 Cush. 517, but it is clearly unsound. The insured solicits the insurance and

selects his policy. As matter of fact, in most cases, the intended course of employment is known and represented to the insurers, to enable them to fix the rate of premium. If that is the case, there can be no difficulty. The insurers contemplate that course of employment, and insure against its extraordinary perils, and it is just and reasonable that the insured should be held to a warranty of seaworthiness adapted to the employment. And if the course of employment is not known or stated, the insurers insure against all extraordinary perils, and it is equally just and reasonable that the insured should adapt his vessel to all ordinary perils, or adapt the course of employment to the capacity of the vessel. It is at his option that the time policy is taken, the course of employment is under his control, and justice requires that he should be held by warranty to that degree of seaworthiness which the time and course of employment he desires and selects may demand. Indeed, it seems to us that the implication of the warranty is not only as just and reasonable, in such a case, as in that of a voyage policy, but that the option in respect to employment absolutely requires it for the protection of the underwriter.

The other objections urged do not deserve consideration. There are difficulties attending the implication of the warranty, as a rule in both descriptions of policy, but they are not materially greater in respect to one than the other, nor are they greater than attend other general rules deemed essential in the law.

And there is another controlling reason why the warranty should be implied in this case. The commerce of this country is national in character, and to some extent in its regulations, but the principles of commercial law governing it may be different in the different states. It is desirable that they be kept as uniform as possible. In respect to the question involved here they are uniform, and we are unwilling to follow an adverse English decision, and disturb that uniformity. The plaintiff, indeed, says that it has already been disturbed by the case of *Capen v. Washington Ins. Co.*, 12 Cush. 517, and relies on that case as an authority, but we do not so understand that case, and we should hesitate to follow it if we did. The action was on a time policy, on a vessel which was at sea when the contract was made, which returned and landed her cargo safely, and was burned at sea on a subsequent voyage. No question was seriously made in respect to the seaworthiness of the vessel at the inception of the risk, and the counsel declined going to the jury on that question of fact, and the case

went up on the questions of law raised by instructions which the court proposed to give the jury on the other issues. Those questions were: 1. Whether, in any contract of insurance on time, there is an implied warranty of seaworthiness at the inception of the risk; 2. Whether, if she was seaworthy, and the policy became operative and attached, the warranty required the vessel to be kept in a seaworthy state during the entire period covered by the policy. In discussing the question whether there was such a warranty, Chief Justice Shaw laid out of the case the question involved here. He said: "We have thought it sufficient to state the ground of our present decision, leaving similar and analogous cases, varied and qualified perhaps by different circumstances, to be decided as they arise." And he then went on to say: "In the first place, it is distinguishable from the case of a time policy, when the vessel is in port at the time the policy is made to take effect at the inception of the risk, and first sails after the policy has attached,—whether it be from a home port, a neighboring, or a foreign port," etc. Other qualifying circumstances are stated, not material here, and also the fact that seaworthiness at the inception of the risk must be presumed in the case, inasmuch as there was no evidence to the contrary. He then states the real question to be decided in the case, thus: "Recurring, then, to the general question as above stated, divested of any qualifying circumstances, the court is of opinion that in the contract of insurance on which this action is brought, there was no implied warranty on the part of the assured that the vessel was seaworthy at the inception of the risk." All that we find determined in that case therefore is, that if the ship is at sea when the risk is to commence, there is no implied warranty of seaworthiness; but it may be otherwise, if as in this case, she is at "a home port, a neighboring, or a foreign port"; and although the case is an exception to the otherwise unbroken current of decision in this country, recognizing an implied warranty of seaworthiness in a time policy in all cases, it is not an authority for overruling the decision of the court below.

The objection to the use of the words "amount of premium" in that part of the charge which is descriptive of the term "seaworthiness," is also well taken.

For these reasons a new trial is advised.

In this opinion the other judges concurred, except McCURDY, J., who having tried the case in the court below did not sit.

OBJECTION TO ADMISSIBILITY OF EVIDENCE WHEN WAIVED: *McKnight v. Denlop*, 55 Am. Dec. 370.

FRAUD, ADMISSION OF EVIDENCE TO PROVE: See *Davis v. Calvert*, 25 Am. Dec. 282; *King v. Cohorn*, 27 Id. 455; *Burch v. Smith*, 65 Id. 154, and note 157 et seq. These cases show that great latitude is allowed where fraud is imputed.

FRAUD AND MISREPRESENTATION MUST BE SPECIFICALLY PLEADED: *Clapp v. County of Cedar*, 68 Am. Dec. 678; *Keller v. Johnson*, 71 Id. 355, and note 357; *Fahie v. Pressey*, 80 Id. 401; *Jenkins v. Long*, 81 Id. 374.

WAIVER OF SEAWORTHINESS IN POLICY OF INSURANCE: See note to *Lapene v. Sun Mut. Ins. Co.*, 58 Am. Dec. 672.

SEAWORTHINESS IS PRESUMED IN POLICY OF INSURANCE: *Dupeyre v. Western etc. Ins. Co.*, 38 Am. Dec. 218. Note to *Lapene v. Sun Mut. Ins. Co.*, 58 Id. 671. And is not at the risk of the insurer: *Barnewall v. Church*, 2 Id. 180.

IN ACTION ON POLICY OF INSURANCE, evidence is admissible to prove a fraudulent combination to insure and lose vessels, and for this purpose it may be shown that other vessels have been insured and lost under circumstances similar to those surrounding the loss of the one in dispute: *Hoxie v. Home Insurance Co.*, 33 Conn. 472, citing the principal case.

IN CASES OF CONSPIRACY, WHERE FRAUD IS CHARGED to have been committed by two or more, pursuant to an agreement to commit frauds similar to the one under investigation, evidence is admissible of knowledge, good faith, or intent, or any other transaction, from which an inference as to the *quo animo* may be drawn: *Edwards v. Warner*, 35 Conn. 518, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Merrill v. Everett*, 38 Conn. 43, to the point that under the statute of 1848 express notice must be given when matters in avoidance are pleaded; without it, evidence of them is not admissible. It is not admissible under the general issue: See also *Mead v. Strouse*, 41 Id. 568, citing the principal case to the same point.

BARTHOLOMEW v. WARNER.

[32 CONNECTICUT, 98.]

AT SALE OF PERSONAL PROPERTY ON EXECUTION there is no warranty of title to the property sold.

OFFICER SELLING PERSONAL PROPERTY on execution is not, as a general rule, bound to make any representations as to the quality or title of the property offered for sale, but he ought to conduct the sale in perfectly good faith, and must not do anything to deceive or mislead the bidder.

OFFICER SELLING PERSONAL PROPERTY under execution cannot actively aid the judgment creditors by concealing the fact, known to himself, that the execution debtor had no title to the property offered for sale.

EXECUTION CREDITOR IS BOUND BY SAME RULES of honesty as any other vendor, as regards the sale made under the execution.

WHERE OFFICER SELLS PERSONAL PROPERTY at execution sale, to which the execution debtor has no title, which fact is known to the officer, the purchaser may recover the money paid while lying in the hands of the officer, in an action for money had and received.

ASSUMPSIT. The opinion states the facts.

Granger and Hitchcock, for the motion.

Warner and Graves, contra.

By Court, DUTTON, J. This was an action of *assumpsit* brought by a purchaser of a horse at a sale on an execution in favor of Arnold and Little against one Roorback. The declaration contained a special count, and a general count for money had and received. The plaintiff claimed that he paid to the constable, the defendant, the full value of the horse, supposing that it was the property of Roorback; that in fact it never was the property of Roorback at all, but that it had belonged to one Morse, who, according to the laws of Massachusetts, where he resided, mortgaged it to one Northway, and that Roorback merely had the possession of it for a special purpose; that previous to the sale Arnold and Little and Northway were informed of the mortgage, but Arnold and Little directed the defendant to sell the horse, and gave him a bond of indemnity. The plaintiff further claimed that at the time of the sale he had no knowledge that Northway or any other person had any claim, mortgage, or lien on the horse, nor that there was any controversy as to the title; that the defendant did not at the sale, or before, disclose the facts or his knowledge concerning the claims of Morse and Northway, but that he concealed his knowledge from the plaintiff; that one of the execution creditors attended the sale, and bid upon the horse, but he did not disclose the claim, mortgage, and lien of Northway and Morse, nor did he direct that the facts should be disclosed by the defendant to the plaintiff, although it was well known to the creditor that the plaintiff had bid upon the horse. After the sale, Northway demanded the horse of the plaintiff and he gave it up to him.

The court, in opposition to the claim of the defendant, instructed the jury that if they found the facts as claimed by the plaintiff, they might render a verdict for the plaintiff on the count for money had and received.

The defendant now insists that there ought to be a new trial for a misdirection. The principal ground taken by him is, that it was the duty of the officer merely to sell whatever title to the property the execution debtor had, and that he was under no obligation at the sale to make any declarations regarding the title to the property. But we think the charge was right. The plaintiff's counsel did not and could not claim that on a sale

on execution there is any warranty even of title. Nor is an officer bound, as a general rule, to make any representations as to the quality or the title of the property offered for sale. But for the very reason that there is no warranty, he ought to conduct the sale in perfectly good faith. He must not say or do anything calculated to deceive or mislead the bidders. If the facts were as claimed by the plaintiff, the execution creditors were endeavoring to collect their debt out of property to which, for this purpose, they had not the shadow of a claim. It never belonged to their debtor. The only persons who had any title to it were Morse and Northway.

The officer, being aware of this, demanded of them an indemnity bond before he would sell the property. The plaintiff claimed, and the jury under the charge would have a right to find, that the officer concealed the facts which were within his knowledge. The term "conceal" implies something more than a mere failure to disclose. We do not, in general, speak of a person's concealing a thing, unless he is in some way called upon to produce it. The circumstances of the case, as claimed by the plaintiff, lead to a strong suspicion that the officer was actively aiding the creditors. If so, the plaintiff parted with his money without receiving any consideration which he could retain, and the defendant obtained it by a breach of good faith, and he would be equally liable with the creditors to refund it. It would be strange, indeed, if such is not the law. It would furnish a very convenient way to collect a bad debt. All that the creditor would be obliged to do would be to find some officer who would aid him in his scheme, and direct him to levy his execution on some stranger's property as the property of the debtor, and then adroitly sell it to some unsuspecting purchaser.

The court, viewing the subject in this light, have no hesitation in sustaining this charge upon the main question. But there are respectable authorities which go much further than it is necessary to go in this case. They maintain the doctrine that if an officer has knowledge of defects of title, he is bound to disclose them at the time of sale: *Commonwealth v. Dickinson*, 5 B. Mon. 506 [43 Am. Dec. 132]. It is, at all events, difficult to reconcile an officer's silence, when he is aware that bidders are proceeding in the supposition that if they purchase they will acquire a good title when he has reason to believe they will not, with our ideas of honesty and propriety. If he is excused from going into particulars, why should he not be

required to put bidders upon their guard? Why should he not let them know that the title may be disputed? Why, at any rate, should not the creditor, who is to derive all the benefit of the sale, be governed by the same rules of honesty as any other vendor? The case of *Young v. Marshall*, 8 Bing. 43, is a strong authority to show that if the creditors were not in justice and equity entitled to this money, this action for money had and received would lie against the officer, he having taken a bond of indemnity, even though he acted in good faith. In that case, a creditor had sold certain goods on execution, after an act of bankruptcy, of which both he and the sheriff were ignorant. The money had actually been paid over to the creditor. Tindal, C. J., says: "It has been contended that the action does not lie, because the money has been paid over to the judgment creditor without notice of the act of bankruptcy. If this were so, I should agree that the money was no longer in the defendant's hands to the use of the plaintiff. But money paid over on an indemnity may be said not to be paid over at all." The assignee recovered the money of the sheriff. But the assignee's right to the money in that case was no better than the mortgagee's right would have been in this. There was a stronger objection to this form of action in that case than in this, because it appeared that the money had actually been paid over, while in this case it does not. The decision is based upon the ground that the creditor was not entitled to the money which the officer had obtained by a sale of property on an execution in his favor, because his debtor was not the owner of the property. According to the principles of that case, Arnold and Little were not entitled to the money in the hands of the defendant, because the property sold did not belong to their debtor; but Northway, if he chose to ratify the sale, was. But he chose not to ratify the sale, but demanded of the purchaser the horse itself, which had not been legally sold. He, having no legal title to it, gave it up to the owner. This clearly gave to the purchaser the same right to the money which Northway would have had. In this view of the case, it involves no question of warranty or fraud on the part of the officer or of the creditors. It is no attempt to make the officer personally responsible for any of his acts. It is the mere question to whom the money in the hands of the officer equitably belongs. It may be considered as coming under that class of cases where one man's money has come into the hands of another through mistake or misapprehension.

Charity requires us to suppose that Arnold and Little would not have levied on this horse, if they had not mistakenly supposed that it belonged to Roorback. After they discovered the mistake, they could not, in common honesty, take the money, and no one else but the plaintiff had any claim to it.

We do not advise a new trial.

In this opinion the other judges concurred, except McCURDY, J., who having tried the case in the court below did not sit.

CAVEAT EMPTOR IS RULE AT SHERIFF'S SALE: *Lang's Heirs v. Waring*, 60 Am. Dec. 533, and note 539; *Maguire v. Marks*, 75 Id. 121; *Boggs v. Fowler and Hargrave*, 76 Id. 561.

SHERIFF'S SALE DEVOID OF GOOD FAITH IS VOID: *Trimble v. Turner*, 53 Am. Dec. 90.

WORDIN v. BEMIS.

[32 CONNECTICUT, 262.]

DEMURRAGE STRICTLY SPEAKING IS SUM OF MONEY due by express contract for the detention of a vessel in loading or unloading one or more days beyond the time allowed for that purpose in the charter-party.

DEMURRAGE BEING CERTAIN SUM DUE by force of an express contract, general *assumpsit* will lie for it.

DAMAGES IN NATURE OF DEMURRAGE are recoverable for the detention of a vessel beyond a reasonable time in unloading only, where there is no express stipulation to pay demurrage. Such damages are recoverable for a breach of the implied contract of the shipper that he will receive the goods in a reasonable time and can be recovered only in special *assumpsit*.

WHERE MASTER RUNS VESSEL ON SHARES, pays all expenses, has entire control of her course of employment, and makes all contracts in respect to her employment in his own name and on his own behalf, he is *pro hac vice* owner, and may maintain an action to recover damages in the nature of demurrage.

WHERE CARGO IS TRANSPORTED BY WATER and there is no specific agreement between the shipper and carrier in respect to the particular wharf or spot at the port, where the cargo shall be landed, or any known custom of the port, the shipper or his agent must be there ready to receive the cargo, on notice of the arrival of the vessel, and upon his failure to do so, the carrier may treat the contract as broken, land the cargo at the usual place, if there is any such, or procure a suitable place at the expense of the shipper, or await his or his agent's tardy movements, and rely upon obtaining compensation in an action for the breach of the implied contract to receive the cargo in a reasonable time.

SHIPPER IS LIABLE FOR INJURY SUSTAINED BY CARRIER through the unreasonable delay of an intermediate carrier in receiving and transporting a cargo, where the bill of lading only requires the original carrier to deliver such cargo to the shipper or his assigns without mention of delivery to such intermediate carrier as such.

VESSELS WHOSE CARGOES ARE TO BE DISCHARGED at the same dock must take their turn in the order of their arrival, and the owner of such dock is not bound to make provision for an unexpected and accidental accumulation of vessels.

DAMAGES IN NATURE OF DEMURRAGE CANNOT BE RECOVERED for an unreasonable delay to a vessel in discharging her cargo, when such detention is caused by an accidental and unexpected accumulation of vessels at the same dock where all must discharge and where each in turn does discharge her cargo.

ASSUMPSIT for freight and damages in the nature of demurrage. The opinion states the case.

Treat and Blake, for the plaintiff.

Chamberlin, for the defendants.

By Court, BUTLER, J. The objection to the sufficiency of the declaration must be overruled.

Demurrage, in the strict sense of the term, means a sum of money due by express contract for the detention of a vessel in loading or unloading, one or more days beyond the time allowed for that purpose in the charter-party. As it is a certain sum, due by force of an express contract, general *assumpsit* will lie for it.

Damages in the nature of demurrage are recoverable for detention beyond a reasonable time in unloading only, and where there is no express stipulation to pay demurrage. They are in the nature of demurrage, because they are for a detention of the vessel, and measured by the day like demurrage, and are damages because they are recovered for a breach of the implied contract of the shipper that he will receive the goods in a reasonable time. *Assumpsit* will lie for them, because resulting from a breach of contract; but the count must be special, as for unliquidated damages in other cases of breach of an implied contract. The plaintiff cannot therefore recover on either of the first two counts of the declaration, for he declares in both for a certain sum as a debt. The third count is special for damages, and sets forth every material fact which the plaintiff is bound to prove in order to recover, or the defendant to answer in order to defend. But the plaintiff has omitted to allege the implied promise to receive the coal in a reasonable time, the breach of which is the foundation of the action. The defect in that count is not, as the defendants suppose, an omission to allege a promise to pay damages or demurrage for detention, but an omission to state the promise to receive the goods in a reasonable time, which the law im-

plies from the facts stated, and which is usually averred. Whether that count is demurrable by reason of that omission or for duplicity, we need not inquire. The defendants have not demurred, and can take nothing from their present objection.

The second objection must also be overruled. It has been holden in England that the master of a vessel, as such, cannot recover damages in the nature of demurrage: *Brouncker v. Scott*, 4 Taunt. 1. The correctness of that decision has been questioned. In *Evans v. Forster*, 1 Barn. & Adol. 118, the decision was followed by Lord Tenterden, "as the safest and wisest course," and such is the law there. In this country the law is not settled, nor is it necessary to decide the question in this case. The plaintiff ran this vessel on shares, paid all expenses, and had entire control of her course of employment, and made all contracts in respect to her employment, in his own name and on his own behalf. He was *pro hac vice* owner, and can maintain his action as such.

The defendants insist, in the third place, that the detention was not their fault. It is not pretended that it was the fault of the plaintiff. He was there, ready and anxious to discharge, and the defendants knew it. The railroad company were not ready to receive; and the defendants say that the company were not their agents. But in this, too, they are wrong. In all cases of the transportation of cargoes by water, when there is no specific agreement between the shipper and carrier in respect to the particular wharf or spot at the port where the cargo should be landed, or any known custom of the port, the shippers or their agents must be there ready to receive it on notice of the arrival of the vessel. In this case, there was no such custom, and no specific agreement. It is found that the bill of lading was the only contract made between the parties in respect to the transportation of the coal, and that is silent on that point. It was, then, the duty of the defendants to be there, or have an agent there, to receive it, or find some convenient spot where it could be deposited in a reasonable time, and on their failure to do so, or of the agent to receive, the plaintiff was at liberty to treat the contract as broken, land the cargo at the usual place, if there was any such, or procure a suitable place at the expense of the defendants, or wait the tardy movements of the defendants or their agents, and rely on obtaining compensation in this action for breach of the implied contract to receive in a reasonable time.

He chose the latter alternative. And now it does not lie in the mouths of the defendants to say that the company were not their agents. The facts found clearly indicate that he was directed to deliver at Belle dock, and that was the dock of the railroad company. It is insisted that the railroad company were mere intermediate carriers, and the plaintiff should be held to have assumed the risk of their delay in receiving the coal, and that such should be the rule in all such cases. This claim is novel. It is not supported by authority, but is argued and urged upon principle. It is not well founded. The contract of the plaintiff, and as the court finds, the only one, is contained in the bill of lading. That requires him to deliver, not to the railroad company, or any intermediate carriers, as such, but in terms, "at the aforesaid port of New Haven, unto S. C. Bemis & Co. (Springfield), or their assigns." The word "Springfield" is *descriptio personarum*, inserted to identify the defendants by their place of residence. The plaintiff did not contract to deliver to the railroad company; nor did the railroad company contract with him, expressly or impliedly, to receive it in a reasonable time, and the defendants did. There is no fact or principle of law which can place him or the defendants in any other position, with respect to each other, or third persons, than that in which they placed themselves by the bill of lading. Moreover, the bill of lading impliedly bound them to be there, or have an agent there, ready to receive the cargo, and if they were not there, and the railroad company were not their agents, their contract was not performed.

Whether it would be well or not that shippers should guard against the consequences resulting from the unreasonable delay of intermediate carriers in receiving goods, and how they could do it, we need not inquire. It is obvious that if they desire to transfer the risk of detention to the carrier by whom they first ship, they must make a different contract from that made in this case. Perhaps a bill of lading which called for a delivery to a railroad company, as intermediate carriers for conveyance, might be framed to import that the first carrier assumed the risk of receipt by the intermediate carrier in a reasonable time, and preclude the implied obligation to receive themselves or by an agent. That implication must be precluded. But would the intermediate carriers, in such case, be liable to the first, if they did not refuse to receive but did neglect to receive in a reasonable time? And suppose

they should refuse to receive at all, what then would be the condition of the first carrier? There are other difficulties which might be suggested, but it will be time enough to consider them when a case is presented which calls for their consideration. It is very clear that this does not.

The defendants further insist that if the railroad company were their agents, still they are not liable, for that the coal was in fact received in a reasonable time, and there was no breach of their implied contract. And this point is well taken, and we must sustain it, though it may operate hardly upon the plaintiff.

There is an apparent equity in the case in favor of the plaintiff. Vessels are expensive; it is expensive to man and run them; the wear and tear is considerable; the coastwise business is one of hardship and exposure, and it is confined to a few months of the year; the remuneration is moderate, and a considerable delay in port is ruinous. The delay in this particular case occasioned a loss exceeding, it may be, the earnings of the voyage or trip. In such a case, the excuse for the delay should be satisfactory, and should be clearly shown, although it furnishes no reason for shifting the plaintiff's hardship upon the defendants, if the latter were not in fault. The excuse in this case is, that the railroad company had facilities for the discharge of seven vessels at the same time, and that they were sufficient to meet the wants of the public in all ordinary times, but that there was an unusual accumulation of vessels at this time, and the plaintiff was discharged in turn. The rule that vessels must take their turn in the order of their arrival is just and necessary, and too well settled to be disregarded. It is well settled, also, by numerous decisions, that the owners of such a road and dock are not bound to make provision for an unexpected and accidental accumulation of vessels, and the defendants are in no worse condition than they would be if the dock and road had been theirs. Influenced by the equity of the case, I had at first some doubt whether the finding in respect to the excuse came up to the necessities of their defense. It is not found that the accumulation was owing to any unexpected cause, or that it might not have been foreseen and provided against by proper foresight and diligence. In several of the cases cited, the vessels were detained by a storm or storms, and all arrived together when the weather cleared up. There, the elements were the cause. Here, the cause is not found, nor is it found

that the accumulation was not the result of previous want of diligence or other fault on the part of the company. Still, it is expressly found that the company did all they could do to hasten the discharge of the vessels after the arrival of the plaintiff, and there is no presumption that they or the defendants expected or could have foreseen the arrival of so many vessels, or were in any way the cause of the accumulation, and we are constrained to hold the excuse sufficient.

It was intimated on the argument that the company required the vessels to be unloaded into their cars, and that there was vacant dock room where, in such an emergency, a part of the detained vessels might also have deposited their cargoes, involving additional expense to the company, but collectible from the owners, and far less than that entailed by the delay upon the plaintiff and others, and that it was the duty of the company to permit them under such circumstances so to unload. But no facts are found which raise that question, and we are not at liberty to consider it.

The superior court must be advised to render judgment for the plaintiff for the amount of his freight merely, and to reject the claim for damages in the nature of demurrage.

In this opinion the other judges concurred.

DEMURRAGE, FOR WHAT, AND WHEN CAN BE COLLECTED: See *Benson v. Atwood*, 71 Am. Dec. 611.

ACTION FOR DAMAGES IN NATURE OF DEMURRAGE is brought on an implied contract that the shipper shall receive and furnish cargoes within a reasonable time. Such time is to be determined from all the facts and circumstances of the case. So if it appear that the shipper is without fault or negligence, he is not liable: *Lake v. Hurd*, 38 Conn. 538, citing the principal case.

DELIVERY OF GOODS BY CARRIER by boat, to whom must be made: *Fisk v. Newton*, 43 Am. Dec. 649; *Farmers' etc. Bank v. Champlain T. Co.*, 56 Id. 68, and notes to these cases; *Norway Plains Co. v. Boston and Maine R. R.*, 61 Id. 423, and note; *Bennett v. Byram & Co.*, 75 Id. 90.

OLMSTEAD v. WINSTED BANK.

[32 CONNECTICUT, 273.]

PROTEST OF PAYMENT OF STOLEN BANK BILLS is not evidence that the bills were stolen, and constitutes no objection to a recovery if they were not stolen. It is, however, evidence that the bank claimed that they were stolen and admissible upon the question of *bona fides*.

PURCHASE OF STOLEN BANK BILLS AT DISCOUNT does not constitute an objection to a recovery thereon. But an offer to sell the bills at less than

the market price of the genuine bills is a fact admissible on the question of good faith.

HOLDER OF STOLEN BANK BILLS who came by them in good faith for a valuable consideration, and in the regular course of business, can recover upon them against the bank.

BONA FIDE HOLDER OF STOLEN BANK BILLS, received in the regular course of business and for a valuable consideration, does not acquire an absolute property therein which he can transmit to a purchaser who has knowledge that the bills were stolen, or were claimed to have been stolen from and not issued by the bank.

PARTY CANNOT ATTACK CREDIBILITY OF HIS OWN WITNESS by evidence of general reputation.

WHERE PARTY'S OWN WITNESS TESTIFIES in respect to a particular fact contrary to what the former believes to be true, he may prove the fact to be otherwise by other competent testimony, no matter how much the particular contradiction may tend to discredit the witness generally.

ASSUMPSIT on a bank bill claimed by the bank to have been stolen from it and purchased by the plaintiff, he knowing that it had been stolen and that payment had been protested. The opinion states the case.

Hawley and Taylor, for the appellant.

Seymour and Hall, contra.

By Court, BUTLER, J. This case is submitted upon briefs. Upon a careful examination of them, we are satisfied that the judgment is right, and should not be disturbed.

We assent to the claim of the plaintiff that the protest was not evidence of the fact that the bills were stolen, and constituted no objection to a recovery if they were not. It was evidence of notice that the bank claimed that they were stolen, and admissible upon the question of *bona fides*, and does not appear to have been admitted for any other purpose.

And we assent to the claim that the purchase of the bills at a discount did not constitute an objection to a recovery in itself. But the offer to sell bank bills at less than the genuine bills of the bank are selling in the market, is calculated to excite suspicion to a greater or less extent, according to circumstances, and that fact also is admissible on the question of good faith. But it does not appear that any point was made upon that question on the trial.

And we assent also to the claim that if the bills were in fact stolen, any holder not concerned in the theft, who came by them *bona fide*, in the regular course of business, and for a valuable consideration, could recover upon them against the bank.

But we do not assent to the proposition that such *bona fide* holder acquired an absolute property, which he could transmit to a purchaser who had knowledge that the bills were stolen, or were claimed to have been stolen from and not issued by the bank. There are *dicta* which seem to sustain the last proposition of the plaintiff, but no decided case in point, and we are satisfied that the law ought not to be so.

In the leading case of *Miller v. Race*, 1 Burr. 452, decided by Lord Mansfield in 1758, the first cited on the plaintiff's brief, the action was trover for a bank note issued by the bank, and lost by the real defendant, and taken by the plaintiff *bona fide* in the course of business for a valuable consideration. That learned judge held, in an elaborate opinion reviewing all the earlier cases, that the plaintiff could recover from the defendant who withheld it as agent of the owner, on the ground that the plaintiff took the note as money in the course of business, without collusion or any ground of suspicion for a valuable consideration; and because it is necessary to the currency of bank bills as money that a *bona fide* holder of them who so takes them in the course of business shall be clothed with a title for his protection. But the opinion of Lord Mansfield does not go the length claimed by the plaintiff in this case. He held expressly that trover would lie in favor of the true owner against a finder before he had paid it away in currency, and impliedly that it would lie against a holder for valuable consideration who took it collusively, or under any circumstances of suspicion or unfair dealing; and if that is so, the holder has not a title which he can confer upon one who does not take himself *bona fide*, without cause for suspicion, for a valuable consideration and in the course of business. The real title remains in the true owner, and does not accompany the bill, and is not obtained by the finder or the thief, but the law on principles of policy confers upon the *bona fide* holder such equitable title as is necessary for his protection. He may collect the note of the bank, or pay it *bona fide* in currency; but his title is limited to the necessities of the case, and does not pass to another, who takes it with knowledge or cause of suspicion in respect to the real and equitable character of the holder's title.

The next case cited on the plaintiff's brief is *Peacock v. Rhodes*, Doug. 633, decided by Lord Mansfield in 1781. That was an action on a bill of exchange which had been stolen and negotiated to an innocent indorsee, and the principles

enounced by him in *Miller v. Race*, 1 Burr. 452, were, so far as applicable, reaffirmed.

The third case cited in the order of time, is *Collins v. Martin*, 1 Bos. & Pul. 648, decided in the common pleas in 1797. That, too, was trover for indorsed bills of exchange, wrongfully pledged for a valuable consideration by the person with whom they were deposited. There, too, the same principles were applied and the same distinction between indorsed bills of exchange or bank notes and other property, founded on the necessity of recognizing an equitable title in the *bona fide* holder to preserve their negotiability, is recognized, and the doctrine is pointedly stated to be that a holder for value who receives them in the course of business may say to the real owner when he demands them, "you have the title, but you shall not be heard in a court of justice to enforce it against good faith and conscience." Chief Justice Eyre, in that case, and in an elaborate opinion, often referred to with approbation, and in the language quoted, founds the title of the holder upon an equitable estoppel, and that doctrine is in harmony with the decisions of Lord Mansfield, the current of authority, and the analogies of the law.

Another case cited by the plaintiff is *King v. Milsom*, 2 Camp. 5. That was trover for a lost bank note, not against the finder, but a *bona fide* holder for a valuable consideration, and the holder retained it. There is nothing in the decision or the opinion of Lord Ellenborough in the case, in conflict with the doctrines settled in *Miller v. Race*, 1 Burr. 452, and *Collins v. Martin*, 1 Bos. & P. 648. The plaintiff also cites *Chitty* and *Bayley on Bills*, but we find no *dicta* in them, or in any other decided case, irreconcilably conflicting with the doctrine of Lord Mansfield, or which are deserving of serious consideration; and we are satisfied that a *bona fide* holder of a lost or stolen bank bill, or indorsed bill of exchange, has not the absolute, perfect, and transferable title of a real owner, but an equitable title by estoppel, created by usage, and protected by the law, because necessary to the perfect negotiability of such paper, but in conflict with the undivested rights of the true owner, and recognized and protected no further than that necessity requires. Such being the law in respect to the title of a holder of a lost or stolen bill, and the court having found that these bills were stolen from the bank, and that the defendants are the true owners of them, and that the plaintiff took them with protest attached and notice that they

were claimed by the bank as their property, and because they were stolen, it is apparent that the plaintiff can never recover, and that substantial justice has been done, whether there was or was not error in the ruling of the court in respect to the admissibility of evidence.

But we discover no error in that ruling. It is elementary law that a party shall not be permitted to attack, by evidence of general reputation, the credibility of his own witness. On the other hand it is equally well settled that if his witness testifies in respect to a particular fact contrary to what he believes to be true, he may prove the fact to be otherwise by other competent testimony, however much the particular contradiction may tend to discredit the witness generally. The extent to which a contradiction in respect to a particular fact will show the witness unworthy of belief generally, cannot be relied upon as a guide in respect to the admissibility of such testimony. The only safe and practicable distinction, therefore, and that which is generally adopted, is between an impeachment generally and a contradiction in respect to a particular fact, and the court below were correctly governed by it.

A new trial is not advised.

In this opinion the other judges concurred, except McCURDY, J., who having tried the case in the court below did not sit.

HOLDER OF BANK BILL STOLEN BEFORE ISSUANCE, receiving it *bona fide*, in the usual course of business, for value, may recover it against the bank, though he was guilty of gross negligence in taking it, there being no evidence of fraud: *Worcester Co. Bank v. Dorchester and Milton Bank*, 57 Am. Dec. 120, and note 122.

BURDEN OF PROOF AS TO CIRCUMSTANCES under which stolen bank bills were acquired: *Wyer v. Dorchester and Milton Bank*, 59 Am. Dec. 137; *Worcester Co. Bank v. Dorchester and Milton Bank*, 57 Id. 120, and notes to these cases.

TITLE ACQUIRED FROM HOLDER OF STOLEN BANK BILL, by purchaser thereof: See note to *New Hope D. B. Co. v. Perry*, 52 Am. Dec. 449.

IMPEACHMENT OF ONE'S OWN WITNESS by proof of his general reputation: See *Burthalter v. Edwards*, 60 Am. Dec. 744, and extended note 749 et seq.; *Blue v. Kibby*, 15 Id. 95, and note 96.

WHEN AND HOW PARTY MAY IMPEACH his own witness: See *Ouchworth v. South Carolina Ins. Co.*, 55 Am. Dec. 692, and note 696; *Swanwick Machines Co. v. Walker*, 55 Id. 172; *Chase v. Commonwealth*, 74 Id. 388, and note 398.

CASES
IN THE
SUPREME COURT
OF
ILLINOIS.

McCONNEL v. KIBBE.

[33 ILLINOIS, 175.]

UPPER OWNER OF TENEMENT HAS RIGHT to have his portion thereof supported by the division walls between him and the lower owner. And for the removal of such support by the lower owner, the upper owner may maintain an action, without showing special damage.

LAW INFERS DAMAGE FROM EVERY INFRINGEMENT OF RIGHT.

FOR INVASION OF PROPERTY RIGHT, nominal damages may be recovered; but such recovery is no bar to a suit for actual damages subsequently sustained, where they did not take place before the commencement of the former suit.

SUCCESSIVE SUITS MAY BE BROUGHT FOR ACTUAL DAMAGES, from time to time, as the damages are sustained, and in each suit the party may recover such damages as he has sustained prior to its commencement, not barred by a previous recovery.

STATUTE OF LIMITATIONS BARS RECOVERY of all damages, whether nominal or substantial, sustained prior to the time within which the law requires an action for their recovery to be brought.

ALLEGATION OF SPECIAL DAMAGES as matter of aggravation, is a substantive allegation of fact, and not an inference of law, resulting from facts antecedently stated.

DECLARATION IN CASE FOR NOMINAL DAMAGES for infringement of a right, and for actual damages subsequently sustained, alleged as matter of aggravation, need not allege when the damages were sustained, and thereunder plaintiff may prove and recover any damages sufficiently described, which he has sustained prior to commencement of suit. But a recovery by him is a bar to a recovery in a subsequent suit of any damages sustained prior to the commencement of the former one.

IN ACTION FOR ORIGINAL WRONG, not in itself actionable, but alleged with continuing injury, and a prayer for special and subsequent damages, the plea of the statute of limitations is not good in bar, for the reason that the action is not for the wrongful act, but solely for the consequences of it.

WHERE ORIGINAL ACT IS OF ITSELF ACTIONABLE, and an action is brought solely for the wrongful act, the statute of limitations is a good plea in bar, and a complete answer to the complaint.

IN ACTION FOR ORIGINAL WRONGFUL ACT, and for subsequent damages alleged as matter of aggravation, the plea of the statute of limitations is good in bar, and a complete answer to the original wrongful act, as defendant is not required, in the first instance, to answer the matter in aggravation. In such case, if plaintiff desires to take advantage of such matter, he must new assign for it, and a replication that the causes of action accrued within such statutory period, is not a new assignment, but after issue joined thereon should be treated as such.

FOR INJURY TO PROPERTY, committed while a tenant has a leasehold interest therein, he may maintain an action for such portion of the damages as he has sustained, and the owner may maintain his action for such portion of them as he sustained as owner of the reversion. But the tenant cannot recover for an injury committed before he leased the premises.

IN ACTION BY OWNER FOR DAMAGES SUSTAINED while property was leased to another party, he is not entitled to recover, if it appears that the injury was committed before the property was leased, and while he was owner in fee,

NEW TRIAL WILL NOT BE GRANTED, when it is apparent that the verdict on re-trial must be the same as on the former trial, although the court below may have erred as to some of the instructions given.

THE opinion states the facts.

McConnel, pro se.

Smith and McClure, for the appellee.

By Court, BECKWITH, J. The present action is on the case for an alleged injury to the reversionary interest of the plaintiff in a brick tenement, in the town of Jacksonville. The declaration contains three counts, each alleging, in substance, that the plaintiff, before the committing of the grievances mentioned, was the owner of so much of the tenement as was above the rooms upon the ground-floor, through which there was a partition wall extending from the foundation of the building to the top of the same; and that the defendant was the owner of the rooms upon the ground-floor of the building. That before the committing of the grievances mentioned, the plaintiff had leased so much of the tenement as belonged to him to one Fox, for a term of ten years; and that afterwards, and while Fox was in possession, under said lease, of so much of the tenement as belonged to the plaintiff, the defendant, on a certain day named, and on divers other days from that time to the commencement of the suit, removed said partition wall between the rooms on the ground-floor, thereby depriving the walls above of their necessary support, to the injury of the

plaintiff's reversionary interest, and alleging as special damage the cracking and sinking of that portion of the tenement above the rooms upon the ground-floor. The defendant pleaded first, not guilty; and second, not guilty within five years. The plaintiff replied to the second plea, that the grievances complained of had been continued from the time they were committed until the commencement of the suit. To this replication there was a demurrer, which was sustained. The plaintiff filed a second replication, alleging that the causes of action accrued within five years, upon which issue was joined. Upon the trial the plaintiff proved that he was the owner of the portion of the tenement described in the declaration as his property; and that while he was the owner thereof, and before the demise of the same to Fox, the defendant removed the partition wall between the rooms on the ground-floor. The court instructed the jury that the plaintiff could not recover, unless the wall was removed after the demise of the premises to Fox and while he was in possession of the same, nor for the original injury or for the subsequent damages, if the wall was removed more than five years before the commencement of the suit. The jury found for the defendant. It was the plaintiff's right to have his portion of the tenement supported by the wall which was removed. The removal of the support was an infringement of his right, for which he might have sustained an action without showing any special damage. The law infers damage from every infringement of a right: *Plumleigh v. Dawson*, 1 Gilm. 544 [41 Am. Dec. 199]; *Fay v. Prentice*, 1 Com. B. 828; *Sampson v. Hoddinott*, 1 Com. B., N. S., 590. The right infringed is property, and for its invasion nominal damages may be recovered, but such recovery is no bar to a suit for actual damages subsequently sustained, where they did not take place before the commencement of the former suit. Successive suits for actual damages may be brought from time to time as the damages are sustained, and in each suit the party may recover such damages as he has sustained prior to its commencement, not barred by a previous recovery. The bar of the statute of limitations operates in the same manner. It bars the recovery of all damages, whether nominal or substantial, those inferred by law and special, which were sustained prior to the time within which the law requires an action for their recovery to be brought.

The declaration in the present case is for the nominal damages inferred by law from the infringement of the plaintiff's

right, and for the actual damages subsequently sustained, which are alleged as a matter of aggravation. Each count states the wrongful act of the defendant in removing the partition wall, which act, it is alleged, was committed on diverse days and times, whereby the plaintiff's right was invaded, from which the law infers damage, and by means of which act he has sustained actual damages. The allegation of special damages as a matter of aggravation is a substantive allegation of fact, and not an inference of law resulting from facts antecedently stated: *Kidgell v. Moore*, 14 Jur. 790. It is not necessary, in a declaration like the present one, to state the time or times when the damages were sustained, as the legal effect of the allegation is, that they were sustained when the wrongful act of the defendant was committed, and on divers other days between that time and the commencement of the suit. Under such a declaration, the plaintiff may prove and recover any damages sufficiently described which he has sustained prior to the commencement of the suit, and a recovery by him is a bar in any subsequent suit to the recovery of any damages sustained prior to the commencement of the former one. The plea of not guilty within five years was a good one. Where the original wrong is not of itself actionable without special damage, such a plea is not good, for the reason that the action is not for the wrongful act, but solely for the consequences of it, and it is no answer to the declaration to plead not guilty of the wrongful act within the period fixed by the statute of limitations. But where the original wrong is of itself actionable, and the action is brought solely for the wrongful act, such a plea is good, as it is a complete answer to the declaration. In the present case, the action is for the original wrongful act, and for the subsequent consequences which are alleged as matters of aggravation. The defendant was not required in the first instance to answer the matters of aggravation. He must make a complete answer to the original wrongful act, and then if the plaintiff desires to take advantage of the matters of aggravation he must now assign for them: *Taylor v. Cole*, 3 Term Rep. 297; *Manchester v. Vale*, 1 Wms. Saund. 28; *Dye v. Leatherdale*, 3 Wils. 20. The plea being an answer to the original act was good. The replication that the causes of action accrued within five years was not in form a new assignment, but after issue was joined thereon, we think it should have been treated as such. As we have before stated, the statute of limitations was a bar to all damages sustained

by the plaintiff more than five years before the commencement of this suit, but it was not a bar to any damages sustained within the five years. He was entitled, upon proving his case, as alleged in his declaration, to recover such damages as he had sustained during that period of time, and the court below erred in instructing the jury that he could not recover such damages if the partition wall was removed more than five years before the commencement of the suit. The main difficulty with plaintiff's case is, that he did not prove it as alleged in his declaration; and the jury could not do otherwise than find for the defendant under the first instruction given for him, which correctly states the law. The declaration alleges that the wrongful act of removing the partition wall was committed after the demise of the plaintiff's portion of the tenement to Fox, and while he was in possession of the same under said demise. The allegation is descriptive of the plaintiff's estate when the wrongful act was committed which caused all the damages, and is a material one. If the partition wall had been removed while Fox had a leasehold interest in the premises, he would have had a right of action for such portion of the damages as he sustained, and the plaintiff a right of action for such portion of them as he sustained as the owner of the reversion. This is the plaintiff's case as he alleges it in his declaration, and the present action is brought to recover only such portion of the damages alleged to have been sustained as the plaintiff is entitled to as the owner of the reversion. The evidence established that the act of the defendant was done before the plaintiff demised the premises to Fox, and while the plaintiff was the owner in fee. Upon the case established by the evidence, the act of the defendant was an invasion of the right of the plaintiff as owner in fee, and not as owner of the reversion; and the subsequent damages sustained by him were by means of an act done to the injury of his ownership in fee, and not by means of an act done to the injury of his reversionary interest as alleged in his declaration. Although Fox leased the premises after the wrongful act of the defendant, he had no right to any damages caused thereby. Upon the whole case, it clearly appears that on another trial a verdict must inevitably be for the defendant; and although the court below erred in some of its instructions, we ought not to grant a new trial where it is apparent that the verdict on a retrial of the cause must be the same as on the former trial: *Sheldon v. School District*, 24 Conn. 88; *Walworth v. Roadsboro*,

24 Vt. 252; *Brantly v. Carter*, 26 Miss. 282; 1 Graham and Waterman on New Trials, 301; 3 Id. 862 et seq.

The judgment of the court below will therefore be affirmed. Judgment affirmed.

INFRINGEMENT OF LEGAL RIGHT, when constitutes a cause of action: *Chapman v. Thames Mfg. Co.*, 33 Am. Dec. 401.

ACTION WILL NOT LIE FOR DAMAGES accruing after judgment in a former action arising out of the same cause: *Adm'r of Whitney v. Town of Clarendon*, 46 Am. Dec. 150.

IN ACTION FOR DAMAGES WHICH DID NOT NECESSARILY ACCRUE from the act complained of, it is necessary that the declaration should state the special damages complained of: *Helm v. McCaughan*, 66 Am. Dec. 588, and note 603.

THE PRINCIPAL CASE WAS AGAIN BEFORE THE COURT, and is reported in 43 Ill. 12; the decision here reported is there cited as showing when the part owner of a building cannot recover for the removal of a partition wall.

RECOVERY OF NOMINAL DAMAGES will not bar an action for actual damages subsequently sustained: *Eaton v. Lyman*, 30 Wis. 50, citing the principal case.

NEW TRIAL WILL NOT BE GRANTED, although the court may have erred in some of its instructions, when it appears that upon a re-trial the verdict must be the same, or that substantial justice has been done: *Hewitt v. Jones*, 72 Ill. 221; *Beseler v. Stephens*, 71 Id. 404; *North Chicago etc. Ry Co. v. Lake View*, 105 Id. 214, all citing the principal case. On this subject, see *Ross v. Bank of Burlington*, 15 Am. Dec. 664; *Pearson v. Burditt*, 80 Id. 649.

CASSELL v. ROSS.

[88 ILLINOIS, 244.]

WHERE BILL IN CHANCERY CALLS FOR ANSWER under oath, the latter must be taken to be true in so far as it is responsive to the bill, and not contradicted by evidence.

WHERE GRANTEE SOLICITS GRANTOR TO PURCHASE OUTSTANDING TITLE, and executes his note in payment therefor when made, such purchase, whether perfect or imperfect, is a sufficient consideration for the note if not induced by fraud, and it makes no difference that the grantee was ignorant of the fact that a subsequently acquired title by his grantor, under the covenants in the deed, would inure to the benefit of the grantee.

COMPROMISE OF DOUBTFUL RIGHT is sufficient consideration for a promise; and it is immaterial on whose side the right ultimately proves to be. This rule is here applied to a grantee who requested his grantor to purchase an outstanding title, and executed his note in payment therefor.

WHERE GRANTEE REQUESTS GRANTOR to purchase an outstanding title, and executes his note in payment therefor, the grantor agreeing when the purchase is made and the note paid, to execute a quitclaim deed, he is not in default in failing to make and deliver such deed, and there is no

failure of consideration until the note is paid in full. Before such time the grantee has no right to demand the deed.

TITLE TO HOMESTEAD USUALLY BEING VESTED IN HUSBAND, he must be treated as acting, at least to some extent, as the trustee of the wife and children for the protection of this right cast by the law upon them; and by virtue of his relation to their rights, he is necessarily vested with power to perform all acts necessary to secure the title, and thus effectuate the design of the statute.

HUSBAND IS AUTHORIZED, WHEN NECESSARY, to purchase an outstanding title for the purpose of securing the enjoyment of the homestead right.

WHEN HUSBAND HOLDING TITLE TO HOMESTEAD has purchased an outstanding title, it will be presumed to have been necessary. But this presumption may be rebutted by the wife upon showing that she or her husband owned the paramount title at the time when such purchase was made.

PRESUMPTION IS THAT HUSBAND ACTS FOR BENEFIT OF WIFE and children, when he acquires or perfects a title to the homestead.

HUSBAND MAY, WITH OR WITHOUT CONSENT OF WIFE, when already in possession under a defective title, acquire an outstanding title on credit, and he cannot, but the wife may, deny that it was paramount. And until it appears that such a title was not acquired, the consideration agreed to be paid therefor will be treated as purchase-money.

WHEN IT IS SOUGHT BY BILL IN CHANCERY to subject the homestead to the payment of a purchase of an outstanding title, the wife is a necessary party to the bill.

WHEN IT IS SOUGHT TO SUBJECT HOMESTEAD TO PAYMENT of the purchase of an outstanding title, and the wife shows that the paramount title was held by herself or her husband, at the time that the purchase was made, the consideration agreed to be paid therefor will not be regarded as purchase-money so as to subject the land to its payment; but all proceedings will be enjoined which tend to deprive the wife of the homestead to the extent of one thousand dollars; but if it appears that the outstanding title purchased was paramount, then a sale must be decreed to enforce the payment of the purchase-money.

WHEN TRUSTEE IN TRUST DEED is authorized to sell for cash upon default of payment of the money for which the deed was given, he cannot sell on credit, and if he does sell on time the sale may be set aside as void.

TRUSTEE UNDER DEED OF TRUST has no power to impose new terms or conditions, or to alter or vary those contained in the deed.

IMMEDIATE GRANTEE OR PURCHASER AT TRUSTEE'S SALE under trust deed is bound at his peril to examine the title he is purchasing, and must see that all precedent conditions of the sale are complied with by the trustee. Without this he cannot protect himself by insisting that he is a purchaser in good faith without notice, and the sale may be set aside. The rule is believed to be different, however, with a remote purchaser.

THE opinion states the case.

Judd, Boyd, and James, for the appellant.

Ross, Tipton, and Winter, for the appellees.

By Court, WALKER, C. J. The purchase of the outstanding title seems to have formed a part of the consideration of the debt secured by the deed of trust. The bill alleges that it

formed the consideration of that entire debt, but the answer sets up the fact that one hundred, of the two hundred dollars which appellant had agreed to pay towards the purchase of the outstanding title, had not been paid. That for the hundred dollars first falling due, appellant had given his two notes of fifty-three dollars each to appellee Ross. That one of these notes had been paid, and that appellee Ross had assigned and transferred the other. The bill also alleges that the note for \$124 was for a portion of this two hundred dollars, for the purchase of the outstanding title. But the answer of Ross states that the remaining one hundred dollars of that purchase, with its accruing interest, together with a small note which he held for goods purchased by appellant, constituted the consideration of the note. The bill calls for the answer to be under oath, and so far as it is responsive to the bill, it must be taken as true, inasmuch as it is not contradicted by evidence.

The note for goods embraced in, and forming a part of this note, to that extent, was beyond all question a consideration. And we have no hesitation in saying that the purchase of the outstanding title, whether perfect or imperfect, if not induced by fraud, was a sufficient consideration for the remainder. It is a maxim of universal application "that ignorance of law excuses no one." Appellant then cannot be heard to say, that he was ignorant that under the law a subsequently acquired title, by Ross, would, under his former covenants, inure to the benefit of appellant. The answer of appellee Ross clearly and unequivocally denies that there was any fraudulent means used to induce appellant to purchase this outstanding title, or that Ross urged or even requested appellant to purchase, but on the contrary, that the purchase was made at the urgent solicitation of appellant; that Ross made the purchase, and with the previous understanding and agreement that appellant should refund two hundred dollars of the four hundred dollars of purchase-money. And this allegation, responsive to the bill, is uncontradicted by any evidence in the record. If this be true, and it must be so considered, upon what principle of justice or fairness can it be said that because that title inured to his benefit, he will not pay the portion he agreed to pay before the purchase was made? Is he now to be permitted to escape payment, and leave Ross the whole burden, when Ross remonstrated and advised against the purchase?

Suppose this title to have been paramount, and that under

the covenants contained in Ross's deed to appellant upon its purchase it would pass by the force of these covenants to appellant's benefit, it could not be said to form no consideration for the notes given on its purchase by appellant. The utmost extent of Ross's liability under those covenants would be the purchase-money with interest, and possibly, an attorney's fee in defending an ejectment suit for possession. Yet the premises may have been, as alleged in the bill, worth, with their improvements, double that sum or more. This, then, would have formed a strong inducement for the purchase of the outstanding title by appellant. Its purchase, if paramount, would have been a protection to him of all of the value of the premises beyond that portion covered by Ross's covenants.

In the case of *McKinley v. Watkins*, 13 Ill. 144, it was held that the compromise of a doubtful right is a sufficient consideration for a promise; and that it is immaterial on whose side the right ultimately proves to be, as it must be on one side or the other. Then, if it is conceded that it is doubtful whether this outstanding title was paramount, or whether Ross's covenants would have covered the value of the land, still, as a compromise between appellant and Ross, it would have been a sufficient consideration for the note.

Or suppose appellant was doubtful of Ross's ability to respond to his covenants, that would have formed a sufficient consideration for the note. Even if it were conceded that this outstanding title was worthless, yet it seems that appellant did not so regard it, as his fears were excited, and he was solicitous and even urgent to procure it, to avoid uncertainty and trouble, if not positive loss. When he entered into the agreement with Ross for its purchase, he was willing to give two hundred dollars to have all of those doubts set at rest, and this constituted a sufficient consideration, as Ross resorted to no unfair or fraudulent means to excite his fears or create those doubts. Nor does the fact that Ross has not executed the quitclaim deed constitute a failure of consideration, inasmuch as he was not bound to do so until the two hundred dollars were paid, which is admitted not to have been paid in full. Nor was Ross in default in not making or tendering such a deed, as appellant was bound to pay, or offer to pay, before he had a right to demand the deed. For these reasons, we are unable to perceive that the note and deed of trust should be canceled.

The next question presented by the record is, whether the note secured by the deed of trust is purchase-money of the homestead of appellant. He, with his family, at the time of the purchase, resided and still resides upon the premises. We have seen that all but a small portion of this note was given for this outstanding title. If appellant had not been holding under a prior acquired title, this question would hardly have been raised. And yet there is nothing in this record from which it can be inferred that the outstanding title was not paramount.

But was the wife estopped to show that she or her husband held the paramount title when the purchase was made of Ross? This depends upon the construction to be given to the act creating the exemption.

The design of the framers of the homestead law manifestly was to secure a home to the wife and children of the debtor. It was for their protection more than his. But the title being usually vested in the husband, he must be treated as acting, at least to some extent, as their trustee for the protection of this right which has been cast by the law upon the wife and children. And by virtue of his relation to their rights, he is necessarily vested with the power to perform all acts necessary to secure the title, and thus effectuate the design of the statute. He is therefore authorized, when necessary, to purchase an outstanding title for the purpose of securing the enjoyment of the right. And when he has made such a purchase, it will be presumed to have been necessary; but this presumption may be rebutted by the wife, upon showing that she or her husband owned the paramount title when the outstanding title was acquired.

If the wife shall show that the real title was so held at the time the outstanding title was obtained, then the consideration agreed to be paid will not be regarded as purchase-money, so as to subject the land to its payment. On the contrary, if the wife fail to show that the paramount title was already held, then it must be considered that the money agreed to be paid for the subsequently acquired title is purchase-money within the statute. The husband being the head of the family, the presumption is, that he acts for their benefit when he acquires or perfects a title to the homestead. When already in possession under a defective title, he may, with or without the consent of the wife, acquire an outstanding title on credit, and the husband cannot, but the wife may, deny that it was para-

mount. And until it appears that such a title was not acquired, the consideration agreed to be paid will be treated as purchase-money.

The wife in this case was a necessary party to the bill. She should have been before the court that her rights might have been acted upon. If before the court, and it appeared that this outstanding title was paramount, then the court would decree a sale to enforce the payment of the purchase-money, or if, on the contrary, it was worthless, then to enjoin all proceedings to deprive her of the homestead to the extent of one thousand dollars.

We now come to the question of the validity of the sale under the deed of trust. The deed authorized Ross to sell upon default of payment of the money, after giving the prescribed notice, for cash, to the highest bidder. The answers of both defendants admit that it was not sold for cash, but that the purchaser gave his note for the entire amount for which the land was sold. Whatever may be said of the power of Ross to give time on the sum due to him, there can be no pretense that he had the right to give any time for the payment of the surplus. As to that portion of the purchase-money he could not release the purchaser, nor could it be discharged in any other mode, or in anything else, than by the payment of the money at the time of the sale. Appellant had conferred no such power by the deed of trust, and he cannot be required to receive Dilworth's note instead of money, nor can he be delayed in the receipt of the surplus over the payment of the debt secured by the trust deed, until Dilworth shall pay his note to Ross. Nor can he be compelled to assume the hazard, however remote, of Ross's insolvency, or to submit to delay in the receipt of the money. He, when the deed of trust was executed, provided for the immediate payment to him of the surplus, but this sale, if sustained, would defeat that provision.

Nor was the offer of Ross to pay the surplus to appellant, on the condition that he would surrender the possession of the land to the purchaser, in any sense a compliance with the terms of the deed of trust. He had no power to impose new terms and conditions, or to alter or vary those contained in the deed. All of his power was derived from the deed, and all acts outside of and beyond its provisions were void. Such a condition was in violation of his duty as a trustee. Under the provisions contained in the deed, the purchaser would be left to his ordinary remedies for the recovery of possession. It

may be, that had Ross made an unconditional tender of the surplus to appellant, in apt time, that a court of equity might not have been inclined to set aside the sale because the purchaser was not required to pay the money, if the transaction appeared to be *bona fide*, and free from other objections.

In this case, Dilworth cannot protect himself by insisting that he was a purchaser in good faith, without notice. He was bound at his peril to examine the title he was purchasing, and if he did so, he found that Ross was dealing with a trust fund. The notice of the sale should have disclosed that fact, and if so, it gave him that notice. Upon discovering that it was a trust fund, he was bound to see that at least all of the conditions of the trust deed, up to the execution of the deed to himself, were complied with and performed by the trustees; and when he became a purchaser upon time, he became a party to the violation of the condition upon which the sale could alone be made. Being chargeable with notice, he cannot evade the effect of the irregularities attending the sale. With a remote purchaser it is believed to be different, but the immediate grantee, under the trustee's sale, must be held to see that all precedent conditions of the sale are complied with by the trustee. For these various reasons the sale should have been set aside.

The decree of the court below is reversed, and the cause remanded, with leave to the complainant to amend his bill, and the defendants to file answers to such amendment, and to both parties to take evidence in the cause; and if the court shall find that the note was given for the purchase-money of the paramount title, in accordance with the views herein expressed, that a decree be entered for a sale of the land; if, however, it shall appear not to have been purchase-money, that a decree be entered for the payment of such sum as may be found due, and order its payment on a day to be named in the decree, and on default of such payment, that the master proceed, in the manner prescribed by the statute, to ascertain whether the land is worth more than one thousand dollars, and, if so, to subject the overplus to sale, as required by the homestead law.

Decree reversed.

ANSWER WHEN RESPONSIVE, HOW FAR CONCLUSIVE: *Feigley v. Feigley*, 61 Am. Dec. 375; *Trout v. Emmons*, 81 Id. 326, and citations in notes to these cases; *Carretson v. Vankoon*, 54 Id. 492; *Claghorn v. Cullen*, 63 Id. 450.

SUITS BY WIFE FOR OR CONCERNING HOMESTEAD: See note to *Guidé v. Guidé*, 76 Am. Dec. 442.

NECESSITY OF WIFE BEING MADE PARTY TO PROCEEDINGS CONCERNING HOMESTEAD: See *Larson v. Reynolds*, 81 Am. Dec. 444, note 451. It is said in Thompson on Homesteads and Exemptions, sec. 695, citing, with others, the principal case, that as to any action directly affecting the homestead right, the wife is a necessary party. With regard to the remaining points in the principal case regarding homesteads and rights therein, it appears to stand isolated, and will be found cited alone in the work above mentioned at sections 365, 390, and 397; and in Smythe on Homestead and Exemptions, sec. 224.

CONVEYANCE BY TRUSTEE UNDER DEED OF TRUST passes the legal title to the estate; and in an action of ejectment for the same, the purchaser need not show that in making the sale the trustee had complied with the conditions specified in the trust deed: *Reece v. Allen*, 48 Am. Dec. 336, and note 339; *Gale v. Mensing*, 64 Id. 197, and note 199 et seq.

IN SALE BY TRUSTEE, RULE OF CAVEAT EMPTOR APPLIES: *Sutton v. Sutton*, 56 Am. Dec. 109.

CONVEYANCE OF HOMESTEAD by trust deed, effect of: See *Kurs v. Brusch*, 81 Am. Dec. 435. Where homestead right exists, has not been released in a mortgage, and is occupied by the parties entitled to claim the homestead exemption, it may be set up in defense to a decree of foreclosure, if its value is not more than one thousand dollars: *Moore v. Tuman*, 33 Ill. 368, citing the principal case.

COMPROMISE OF CLAIM AGAINST ESTATE is sufficient consideration to support a promise by the heirs: *Husband v. Epling*, 81 Ill. 176, citing the principal case.

PURCHASER UNDER TRUST DEED, containing a power of sale, is chargeable with notice of all defects and irregularities attending the sale, and their effect cannot be evaded by him; but as to remote purchasers, the rule is different: *Hamilton v. Lubukee*, 51 Ill. 420; *Garnett v. Cockerill*, 79 Id. 84; S. O., 84 Id. 324; *Johanson v. Watson*, 87 Id. 539. But as to the latter, the sale is valid, and must stand in favor of them when they have no notice: *Fairman v. Peck*, 87 Id. 163; *Munn v. Burges*, 70 Id. 615. They are not bound to go behind the trustees' deed, reciting that all of the requirements of the deed have been complied with, to ascertain whether or not such recitals are true: *Wilson v. South Park Comm'rs*, 70 Id. 50, all citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED in *Waterman v. Spaulding*, 51 Ill. 430, as to when a trustee under a deed of trust can sell on credit.

BROWN v. METZ.

[33 ILLINOIS, 269.]

WHERE NAME OF PRIOR GRANTOR AND SUBSEQUENT GRANTOR of land is the same in the conveyances, he will be presumed to be the same person.

GENERAL COVENANT OF WARRANTY PASSES with the seisin of the land.

WHERE GRANTOR BEFORE ANY BREACH OF COVENANT OF WARRANTY contained in his deed becomes reinvested with the seisin which he conveyed, the covenant is extinguished. The estate granted by him ceased upon

the reconveyance, and the covenant attendant upon the estate, and only co-extensive with it, was extinguished when the estate ceased.

PARTY CANNOT BECOME ASSIGNEE OF HIS OWN OBLIGATION, and when an obligation is transferred to an obligor by an instrument in the form of an assignment, instead of taking effect as such it operates as an extinction of the obligor's liability.

WHEN WARRANTOR TAKES BACK ESTATE as large as that which he had made the warranty is defeated. He cannot warrant land to himself, nor be an assignee of himself.

PARTY SEIZED OF ESTATE CONVEYED has power to release a covenantor or warrantor from his liability before the covenant or warranty is broken.

WHERE COVENANT OR WARRANTY RUNS WITH LAND until a breach, a reconveyance of the land before that time to the covenantor or warrantor transfers to him the covenant or warranty without liability upon it to any one.

WHERE GRANTOR HAS CONVEYED LAND with covenant of warranty, a reconveyance to him does not revive the obligation. The latter conveyance is made either with or without covenant or warranty, at the will of the grantor, and there is no liability resting upon him unless there is new covenants or warranty, whereby he enters into new obligations.

THE opinion contains the facts.

Skinner and Marsh, for the appellant.

Browning and Bushnell, for the appellee.

By Court, BECKWITH, J. On the twenty-sixth day of March, 1857, James Brown, James R. W. Hinchman, and John S. Loomis conveyed two lots of land to Anton J. Lubbe by deed containing a general covenant of warranty. On the same day, Lubbe conveyed the premises in fee to Newton Flagg in trust to secure the payment of Lubbe's two promissory notes for \$1,076, payable to Brown, Hinchman, and Loomis, with a power of sale in default of payment. Under this power of sale, Flagg, on the 23d of March, 1859, sold and conveyed the premises to James Brown, who, on the 28th of the same month, conveyed the same by quitclaim deed to Anton J. Lubbe, who, on the 30th of April, 1862, conveyed the same by quitclaim deed to the appellee. On the 13th of October, 1856, Hinchman and Loomis executed a mortgage of the premises to Calvin H. Chadsey, and the appellee alleges that he has been evicted by the foreclosure of this mortgage. The suit is brought by the appellee against Brown, Hinchman, and Loomis for the recovery of damages, sustained by an alleged breach of their covenant of warranty, occasioned by the eviction. Hinchman and Loomis were not served with process. The covenant of warranty passed with the seisin of the land from Lubbe to Flagg, and from him to James Brown. The James Brown to

whom Flagg conveyed will be presumed to be the person who by that name executed the conveyance to Lubbe: 2 Phill. Ev. 508; *Sewell v. Evans*, 4 Q. B. 626; *Roden v. Ryde*, 4 Id. 629; *Simpson v. Dinsmore*, 9 Mees. & W. 47. The appellant having, before any breach of his covenant, become reinvested with the seisin which he conveyed, and which he covenanted to warrant and defend, his obligation in this regard was extinguished. The estate granted by him ceased upon the reconveyance, and the covenant attendant upon the estate, and only co-extensive with that, was extinguished when the estate ceased. The law does not allow persons to become assignees of their own obligations, and when an obligation is transferred to an obligor by an instrument in the form of an assignment, instead of taking effect as such it operates as an extinction of the obligor's liability. The liability of a covenantor upon the covenant of warranty now in use is, in many respects, the same that it was under the old charter of warranty, out of which the nature and incidents of the present covenant are derived. The acts which extinguished the liability of the warrantor under the old charter of warranty, should have the same effect in regard to the present covenant of that description. The rule in regard to the extinction of the liability of a covenantor to warrant and defend the title to realty does not differ from that which obtains respecting other obligations.

Notes, bonds, and all obligations, when assigned to the obligor, are extinguished by operation of law. Coke, in his commentaries upon Littleton, says (see sec. 743): "When the warrantor takes back an estate as large as that which he had made, the warranty is defeated; because he cannot warrant land to himself, nor be an assignee of himself." Littleton and his illustrious commentator give numerous instances of the extinction of covenants by a reconveyance of the estate to the warrantor: 1 Shep. Touch. 201; Platt on Covenants, 585.

The person seised of the estate conveyed always had the power to release the covenantor, or warrantor, from his liability before the covenant or warranty was broken. As the covenant or warranty ran with the land until a breach, the reconveyance of the land before that time to the covenantor, or warrantor, transferred to him the covenant or warranty, without liability upon it to any one. There was no reason for keeping the obligation in force after that time. The covenant was designed to secure an indemnity to the grantee, and to those claiming under him, in case he, or they, were deprived

of the estate; and when the estate was reconveyed to the grantor before any loss was sustained, the purpose for which the covenant was used was consummated. Inasmuch as a formal release could not be executed by the covenantor to himself, the law made a reconveyance (under such circumstances) operate as a release. A subsequent conveyance of the premises did not revive the obligation. Such a conveyance was made either with or without warranty or covenants, at the will of the grantor; and there was no liability resting on him, unless there was a new warranty or covenants, whereby he entered into a new obligation. Inasmuch as Hinchman and Loomis are not in court, it is unnecessary to define their rights or liabilities. We are of the opinion that Brown's liability was extinguished; and the judgment against him is reversed and the cause remanded.

Judgment reversed.

WHERE WRIT IS SERVED BY PARTY DEPUTIZED BY SHERIFF, and bearing the same name as that of the plaintiff in the action, if there is no evidence to the contrary, the court will presume from the identity of names that the party serving the writ was the plaintiff in the action: *Fulkins v. O'Sullivan*, 79 Ill. 525, citing the principal case.

COVENANT OF WARRANTY RUNS WITH LAND: *Logan v. Moulder*, 33 Am. Dec. 338; *Brown v. Staples*, 48 Id. 504, and note 507; *Blair v. Allen*, 55 Ind. 411, citing the principal case.

WHERE TWO CONVEY WITH WARRANTY, and the grantee reconveys to one of them with warranty, the first warranty is not extinguished: *Birney v. Hann*, 13 Am. Dec. 167.

GRANTEE BY DEED CONTAINING COVENANTS OF WARRANTY, while he continues to be the owner of the land, may release the covenants: *Brown v. Staples*, 48 Am. Dec. 504.

CONVEYANCE AND RECONVEYANCE BETWEEN SAME PARTIES extinguishes or cancels, by operation of law, all covenants contained in the first conveyance, and no action can be maintained thereon by the grantee in the reconveyance, or by his assigns: *Silverman v. Loomis*, 104 Ill. 142, citing the principal case.

NICKERSON v. SHELDON.

[32 ILLINOIS, 372.]

WHERE DECLARATION IN ASSUMPSIT ON PROMISSORY NOTE counts specially on the note, and also contains the common counts, a general demurrer thereto must be overruled, if the common counts are good, whatever may be the character of the special count.

PROMISSORY NOTE IS EVIDENCE, under the common counts in *assumpsit*, in the assessment of damages, without proving any consideration.

PROMISSORY NOTE REMAINS NEGOTIABLE when the following additional clause is inserted: "We further agree that if the above note is not paid without suit, to pay ten dollars in addition to the above, for attorney's fees," because the amount to be paid remains absolutely certain.

THE opinion states the facts.

S. P. Shope, for the appellants.

G. Barrere, for the appellee.

By Court, BREESE, J. This was an action of *assumpsit* brought on a promissory note. The declaration counts specially on the note, and contains the common counts for money lent and advanced, had and received, paid, laid out, and expended, and for goods and lands sold to the defendants by the plaintiff.

To the declaration, a general demurrer was interposed, on which the court gave judgment for the plaintiff and assessed the damages.

We see no error in the proceedings of any character. The common counts being good, whatever may be the character of the special count, the demurrer had to be overruled. The note was evidence, under the common counts in the assessment of damages, without proving any consideration: *Bilderback v. Burlingame*, 27 Ill. 342.

But it is objected that the note sued upon was not negotiable under the statute. This objection is predicated on this clause in the instrument: "We further agree that if the above note is not paid without suit, to pay ten dollars in addition to the above for attorney's fees."

It is said this undertaking destroys the instrument as a promissory note, since it requires extrinsic evidence to show that the note was not paid without suit, and the case of *Lowe v. Bliss*, 24 Ill. 168 [76 Am. Dec. 742], is referred to in support of the objection. In that case, the note was for a sum of money payable at the Kankakee Bank, Kankakee, Illinois, value received, with current rate of exchange on New York. This stipulation for current rate of exchange on New York made the amount due by the note uncertain, and so deprived it of its negotiability. But the amount due by this note is absolutely certain, and it possesses all the requisites of a negotiable instrument under the statute: *Stewart v. Smith*, 28 Id. 397. There is no uncertainty as to the precise sum of money to be paid on the maturity of the note: *Houghton v. Francis*, 29 Id. 244.

The plaintiff does not declare for the ten dollars, nor was it allowed to him in the assessment of damages. He recovered only the principal and interest due upon the note.

There being no error in the record, the judgment must be affirmed.

Judgment affirmed.

DEMURRER TO WHOLE DECLARATION, one count in which is good, must be overruled: *Tinsman v. Bekidere etc. R. R. Co.*, 64 Am. Dec. 415; *Munn v. Taulman*, 81 Id. 508, and note.

NOTE, ADMISSIBILITY OF, IN EVIDENCE, under the money counts: *Mathews v. Fogg*, 44 Am. Dec. 257; *Payne v. Couch*, 46 Id. 497, and note 498; *Dart v. Sherwood*, 76 Id. 228. As to a bill of exchange, see *Farmers' etc. Bank v. Payne*, 68 Id. 362. When the execution of the note is proved, it is sufficient evidence under the common money counts to authorize a recovery without proof of consideration: *Bozberger v. Scott*, 88 Ill. 478, citing the principal case.

NOTE CONTAINING CONDITION IS UNNEGOTIABLE. — It must be a promise to pay absolutely and at all events. Note to *Woolley v. Sergeant*, 14 Am. Dec. 423; *Hubbard v. Mosely*, 71 Id. 698. For instances under this rule, see *Read v. McNulty*, 78 Id. 467; *Lowe v. Bliss*, 76 Id. 742; *Smith v. Kendall*, 80 Id. 83.

NICKERSON v. BABCOOK, 33 ILL. 374, is decided on the authority of the principal case.

CALDWELL v. CITY OF ALTON.

[88 ILLINOIS, 416.]

CORPORATION, PUBLIC OR PRIVATE, possesses and can exercise no powers other than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created.

POWER TO ESTABLISH AND REGULATE MARKETS includes power to purchase a site and erect the necessary buildings and stalls upon it, and when provided, to adopt such rules in regard to it, and to the business to be there transacted as may be deemed reasonable and just.

MARKET IS DESIGNATED PLACE IN TOWN OR CITY to which all persons can repair who wish to buy or sell articles there exposed for sale, or it is defined by English law to be a franchise or liberty derived from the crown, or in some cases held by prescription, which presupposes a grant and may be granted to a public body or a private person.

CITY AUTHORITIES MAY ADOPT SUCH REGULATIONS in regard to market within its limits as have reference to the preservation of peace and good order and the health of the city. They should be of a police and sanitary character, and an attempt by color of regulation to restrain trade is an abuse of power.

WHERE LIMITS OF MARKET ARE SPECIALLY DEFINED in an ordinance, and embrace but a portion of a city, the regulations prescribed for it can only operate within those limits. They cannot under this power be made to extend throughout the city.

WHERE MARKET IS ESTABLISHED BY ORDINANCE and its limits defined, the power of the city council to prescribe regulations for its operation within those limits is plenary. But under such power the regulations cannot be made to embrace the whole city.

POWER TO RESTRAIN HAWKERS AND PEDDLERS from using the streets of a city for purposes of traffic has nothing to do with the power to regulate a market occupying but a small portion of such city. The former may be regulated under the power to prevent nuisances.

CITY CANNOT BY ORDINANCE UNDER PRETEXT of regulating a market, restrain a regular merchant from selling his goods or carrying on his lawful trade in the city during a portion of each day, outside the market limits; such a regulation would be in restraint of trade, unreasonable, unjust, and void.

CITY MAY BY ORDINANCE, when given power by its charter, prevent the keeping on hand for sale decaying vegetables.

THE opinion contains the facts.

Yager, for the plaintiff in error.

Gambrill, for the defendant in error.

By Court, BREESE, J. This case comes before this court on the following agreed state of facts: That the charter of the city of Alton provides that its common council shall have the power to establish and regulate markets; that the council did, in pursuance of this provision, pass an ordinance prohibiting during market hours the sale of vegetables outside of the limits of the market; that the plaintiff in error sold vegetables at his store and regular place of business during market hours, the store being beyond and outside the limits of the market; that the plaintiff in error was, at the time of so selling, a regular merchant or dealer in family groceries in the city of Alton, and that the vegetables were sold at his store; and it was further agreed that such sale was contrary to the provisions of the ordinance.

On these facts the court below found for the city, and the record is brought here, where it is insisted by the plaintiff in error that the common council has not the power, under the city charter, to pass the ordinance in question, and that the same is in restraint of trade, and void.

The city contends that the ordinance is not in restraint of trade, but is reasonable and proper, as being in regulation of trade, and that the council had ample power to pass it.

It is a principle everywhere recognized, that a corporation, public or private, possesses and can exercise no other powers than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes

for which it was created: *Trustees v. McConnell*, 12 Ill. 140; 2 Kent's Com. 298; *McIntire v. Preston*, 5 Gilm. 60 [48 Am. Dec. 321]; *Firemen's Ins. Co. v. Ely*, 2 Cow. 709; Angell and Ames on Corporations, 85.

The power, therefore, to establish and regulate markets includes the power to purchase the site and the erection of the necessary buildings and stalls upon it, and, when provided, to adopt such rules in regard to it, and to the business to be there transacted, as may be deemed reasonable and just.

A market, says Blackstone (2 Bla. Com. 37), is a franchise or liberty derived from the crown, or in some cases, held by prescription, which presupposes a grant, and may be granted to a public body or to a private person.

It is a designated place in a town or city to which all persons can repair who wish to buy or sell articles there exposed for sale, and in some cities they are known by the articles there exposed to sale. They have been found to be a public convenience when properly regulated. Such regulations as the city authorities may adopt in regard to them should have, and generally have, reference to the preservation of peace and good order and the health of the city. They should be of a police and sanitary character, and an attempt by color of regulations, to restrain trade, is an abuse of the power. As the limits of this market are specially defined in the ordinance, and embrace but a portion of the city, the regulations prescribed for it can only operate within those limits. They could not, under this power, be made to extend throughout the city, but must be confined within the market limits. The facts in this case show that the plaintiff was a regular merchant, doing business in the city outside of the market limits; consequently, this regulation could not affect him.

When a market is established under such a power, and its limits defined, it might be admitted the power of the council over it to prescribe regulations to operate within those limits was plenary, but under such a power the regulations could not be made to embrace the whole city.

The power to restrain hawkers and peddlers from using the streets of a city for purposes of traffic has nothing to do with the power to regulate a market occupying but a small portion of the city. That may be arranged under the power to prevent nuisances.

If the city can, by ordinance, restrain a merchant from selling his goods outside of the market limits during a portion of

each day, it might, with the same propriety, require all flour to be sold on a particular lot, all high wines on another, and vegetables and grain on another. No one will deny such regulations would be in restraint of trade, and therefore void.

The argument of the defendant in error, that the health of the city might be prejudiced by keeping on hand for sale decaying vegetables, is met by the consideration that the city council have abundant power, by section 9 of the charter, to provide by ordinance against this.

We have examined the cases referred to by the counsel for the city, and cannot perceive that any one of them has a direct bearing on, or application to, this case.

The case of *Wartman v. Philadelphia*, 33 Pa. St. 202, was an application for an injunction to prevent the city authorities from demolishing the public market-houses on High Street, and building others by which a large debt would be entailed on the city. The court decided it was competent for the legislature to bestow upon the authorities of the city this power, and in the opinion, Chief Justice Black, by whom it was delivered, takes occasion to descant on the necessity and convenience of markets, without, however, expressing any opinion how far the power to regulate them extended. The point before us was not in this case. The case in 7 Iowa, 104, is like this, with this difference: there the public market was not confined to a specified district, as here. The court was not unanimous, and the majority base the opinion on *Bush v. Seabury*, 8 Johns. 418, and *Village of Buffalo v. Webster*, 10 Wend. 100.

The case of *Bush v. Seabury*, *supra*, was a case of hawking,—peddling meat out of a wagon,—and the ordinance under which the defendant was convicted expressly prohibited hawking about any kind of beef, pork, etc., but the person wishing to sell the same was required to repair to the public market-house, and there expose the same for sale. The act of the legislature in this case provided that the trustees of the village might establish such rules and regulations as they might, from time to time, deem proper, and such, in particular, as are “relative to public markets” within the said village, and relative to stands.

The case of *Village of Buffalo v. Webster*, *supra*, was also a case of “hawking about meats within the bounds of the corporation.”

The case of *Town Council of Winnsboro v. Smart*, 11 Rich.

551, merely decides that an ordinance prohibiting the sale of butcher's meat within the corporate limits of a town, except at the public market, is not in restraint but in regulation of trade.

The case of *Skelton v. Mayor of Mobile*, 30 Ala. 540, decides that an ordinance prohibiting "all hawking and peddling about the streets of the city, of meat, game, poultry, vegetables, or any other article or commodity usually sold or vended in the market," is not unreasonable, unconstitutional, or against common right.

If we were disposed to accord in the conclusion to which the court arrived in this case, it is not the case before us. The defendant, in the case we are considering, was a regular merchant and trader in the city of Alton, the sale of vegetables being a part of his calling. He did not do business within the limits of the market, but outside thereof, and it seems to us was protected by the general laws of the state in the unmolested pursuit of that business, and we think the power does not exist in the city council to restrain him in his lawful trade, under the pretext of regulating a market within the bounds of which he did not transact his business. Such a regulation is in restraint of trade, unreasonable, and unjust.

For the reasons given, the judgment must be reversed.

Judgment reversed.

POWER TO LIMIT AND REGULATE MARKETS BY ORDINANCES. — This subject has been treated at some length in the note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 637, 638, and see, on the same topic, *Bethune v. Hughes*, 73 Id. 789, and note 793. Judge Dillon states the rule to be, that "the states, under their police power, may delegate to municipal corporations the authority to establish or authorize the establishment of markets; and it is competent to such corporations, under proper grants of power, to enact ordinances forbidding sales and purchases of marketable articles except at designated market places. The extent of the power possessed by a particular corporation depends upon its charter": 1 Dillon on Municipal Corporations, 3d ed., sec. 284; Teideman's Limitations on Police Power, 312; supported by *First Municipality v. Cutting*, 4 La. Ann. 335; *Cougot v. City of New Orleans*, 16 Id. 21; *Yates v. City of Milwaukee*, 12 Wis. 673; *Smith v. City of Newbern*, 70 N. C. 19. In *Wartman v. City of Philadelphia*, 33 Pa. St. 209, Chief Justice Black, says: "The necessity of a public market, where the producers and consumers of fresh provisions can be brought together at stated times for the purchase and sale of those commodities, is very apparent. There is nothing which more imperatively requires the constant supervision of some authority which can regulate and control it. Such authority in this country is seldom, if ever, vested in individuals. It can never be so well placed as when it is put into the hands of the corporate officers who represent the people immediately interested. A municipal corporation, comprising a town of any considerable magnitude, without a public market subject to the regulation of its

own local authorities, would be an anomaly which at present has no existence among us. The state might undoubtedly withhold from a town or a city the right to regulate its markets, but to do so would be an act of mere tyranny, and a gross violation of the principle universally conceded to be just, that every community, whether large or small, should be permitted to control in their own way all those things which concern nobody but themselves. The daily supply of food to the people of a city is emphatically their own affair. It is true that the persons who bring provisions to the market have also a sort of interest in it, but not such an interest as entitles them to a voice in its regulation. The laws of a market (I am now using the word in its largest sense) are always made by the persons who reside at the place, and that, whether they be buyers or sellers. It is therefore the common law of Pennsylvania that every municipal corporation, which has power to make by-laws, and establish ordinances to promote the general welfare and preserve the peace of a town or city, may fix the time or places of holding public markets for the sale of food, and make such other regulations concerning them as may conduce to the public interest. We take this to be the true rule, because it is necessary and proper, in harmony with the sentiments of the people, universally practiced by the towns, and universally submitted to by the residents in the country." The reasoning upon which the above doctrine is based is ably shown by Taliaferro, J., in *City of New Orleans v. Stafford*, 21 Am. Rep. 565, where he says: "By way of illustrating this necessarily existing power to regulate the number, location, and management of markets, take the city of New Orleans, in a warm climate, located in a low district of country, surrounded by marshes and swamps, which, in the hot season, under favorable conditions, envelope its large population in a malarious atmosphere. Under such circumstances, the danger of epidemics becomes imminent. It behooves the city authorities at such periods to be on the alert to obviate local causes of disease within the limits of the city. Among such causes, the decay of animal and vegetable matter is a prominent one. The markets must therefore, on that account, be strictly attended to, and such measures adopted in regard to them as, in the judgment of the proper authorities, the public health may require. Suppose, under such a condition of things, it should be found necessary, as a sanitary regulation, to reduce the number of markets, to abolish some of them, and thereby avoid their becoming causes of disease; suppose the lessee of a public market and the keeper of a private market should find the markets under their control abolished, closed, or suspended, from considerations of public security and benefit, before the expiration of the time for which their licenses were to continue, — could they be sustained by law in a demand to be permitted to continue and keep open the markets they had charge of on the pretense that they had a vested right to keep them open? Surely not. . . . We presume it will not be denied that, under circumstances of peril and emergency, the law-maker would have the right to abolish or suspend an occupation imperiling the public safety. This power is inherent in him. He may exercise it prospectively for prevention as well as *pro re nata* for immediate effect. It is within his discretion when to exercise this power; and persons under license to pursue such occupations, as may, in the public need and interest, be affected by the exercise of the police power, embark in those occupations, subject to the disadvantages which may result from the exercise of that power."

Where a city ordinance authorizes the commissioners of such city, when they deem it necessary, to vacate or discontinue the lease or hiring of any of the stalls of a market, they are vested with an absolute discretion in the

matter, limited only by the purpose for which their powers are conferred, — the good of the city: *City Council of Charleston v. Goldsmith*, 2 Speers, 423. So where a city, deriving power from its charter, passes an ordinance regulating the sale and occupation of stalls in certain markets, a person so occupying a stall may be ejected, fined, and imprisoned for non-compliance with the provisions of the ordinance: *City of Dubuque v. Leiber*, 11 Iowa, 407; see also *City of Dubuque v. Miller*, 11 Id. 584. Again, a city may, by ordinance, provide for the ejectment of any person occupying a table, stand, or stall in a market, without the consent of the collector of the revenues thereof: *Donat v. Beombay*, 15 La. Ann. 377. An ordinance may impose the collection of a certain sum from parties occupying stands in a market place, and is lawful, and may be enforced: *City of Cincinnati v. Buckingham*, 10 Ohio, 257. Such sum may be imposed by licenses issued for that purpose under an ordinance: *Hatch v. Pendergast*, 15 Md. 251. Or an ordinance may provide for the leasing of market stalls at public auction to the highest bidder: *Woolpper v. City of Philadelphia*, 38 Pa. St. 203. Where a city is authorized by its charter to regulate manner and place of selling hay within its limits, an ordinance forbidding, under penalty, the exposing of any hay for sale, in certain wards of the city, without first having such hay weighed, and complying with other provisions of the ordinance, is not unreasonable, oppressive, or repugnant to the laws or constitution: *Yates v. City of Milwaukee*, 12 Wis. 673. But an ordinance which requires all parties selling hay and other produce within the city limits to pay a certain fee is unreasonable and void: *Kip v. Mayor and Aldermen of Paterson*, 26 N. J. L. 298.

Where a city charter empowers it to prevent huckstering and forestalling, and to establish and regulate markets and market places, for the sale of provisions, etc., but prohibits the assessment of any charge upon persons bringing provisions to the markets in wagons, etc., it is not in the power of the city council, by ordinance, to include parties as hucksters, who do not fall within the ordinary meaning of that term, and an ordinance defining a huckster to be "any person, not a farmer or butcher, who shall sell, or offer for sale, any commodity not of his own manufacture," and subjecting such party to a penalty, is in conflict with law, a restraint upon trade, and void: *Maye v. City of Cincinnati*, 1 Ohio St. 268. So is an ordinance requiring a huckster to take and pay for a license, under a penalty, when it does not appear that prudence requires such ordinance: *Dunham v. Trustees of Rochester*, 5 Cow. 462. The power to establish and regulate markets by ordinance, carries with it power to shift them from place to place, when the necessities or convenience of the people demand it: *Wartman v. City of Philadelphia*, 33 Pa. St. 202; *Gall v. City of Cincinnati*, 18 Ohio St. 563. A city may, by ordinance, regulate the sale of fresh meat within the city, and designate the place or places where such meat may be sold: *City of St. Paul v. Colter*, 12 Mich. 41; *Mayor of Rochester v. Rood*, Loral's Supp. to Hill & D. 146; *Trustees of Rochester v. Pettinger*, 17 Wend. 265; *Bush v. Seabury*, 8 Johns. 418; *Peck v. City of Austin*, 22 Tex. 261. The sale of such meat may thus be limited to a specified public market: *Ash v. People*, 11 Mich. 347; *Town Council of Winnebago v. Smart*, 11 Rich. 551; *City of Brooklyn v. Cleves*, Loral's Supp. to Hill & D. 231.

CORPORATION CAN EXERCISE ONLY SUCH POWERS as are given it in plain words in its act of incorporation, or such as are given by necessary implication: *Commonwealth v. Erie etc. R. R. Co.*, 67 Am. Dec. 471; *Abby v. Billups*, 72 Id. 143; *Bardetown etc. R. R. Co. v. Metcalfe*, 81 Id. 541, and notes to these cases.

ORDINANCE PROHIBITING HAWKING AND PEDDLING about streets of a city of articles usually sold in markets, is not unconstitutional: *Sheldon v. Mayor of Mobile*, 68 Am. Dec. 143, and note 144.

POWER OF CITY TO ENACT SANITARY REGULATIONS: *City of St. Paul v. Laidler*, 72 Am. Dec. 89, and note 97.

DOWNS v. JACKSON.

[88 ILLINOIS, 464.]

EACH PARTNER MUST EXONERATE the other from a moiety of a joint debt. No act falling short of a complete exoneration of one partner and his property from so much of the liability as he is entitled to be exonerated from, will operate as a discharge of the other from his obligation in that regard.

SALE EN MASSE OF LANDS belonging to partners in severalty for the discharge of a joint partnership debt does not discharge any part of the property sold nor the parties from their respective duties, namely, to each pay a moiety of the debt.

WHERE THERE IS SALE EN MASSE of lands belonging to partners in severalty to discharge a joint partnership debt, neither can obtain a discharge of his property without paying the whole amount of the purchase money with interest, and each of them has the same right after the sale, within the time allowed to redeem the lands for that purpose as he had before that time to pay the debt to discharge himself from personal liability.

WHERE LANDS OWNED BY PARTNERS IN SEVERALTY are sold *en masse* under execution to discharge a partnership debt, and one of the partners redeems the lands, he is entitled in equity to recover from the other one moiety of the money paid by him with interest thereon from the time of its payment.

CROSS-DEMAND MAY BE SET OFF in an action at law.

EQUITY WILL NOT SET OFF mere cross-demands.

THE opinion states the facts.

Henry and Read, for the plaintiff in error.

Moulton, for the defendant in error.

By Court, BECKWITH, J. This was a bill in chancery for contribution and a set-off. The parties were partners sharing profits and losses equally in the manufacture and sale of furniture for one year, ending November 22, 1860, when the co-partnership was dissolved, and the plaintiff in error bought the interest of the defendant in error in certain furniture belonging to the firm, and gave his notes therefor, a part of which were paid, but upon the remainder there was due at the commencement of the suit about two hundred dollars. At the time of said dissolution, the firm was indebted to Roundy,

Chabin, & Co., in the sum of about four hundred dollars, upon which indebtedness a judgment was rendered in April, 1861. An execution was afterwards issued thereon and satisfied by a sale *en masse* of certain lands belonging to the parties severally. On the first day of January, 1862, the plaintiff in error redeemed from the sale by paying to the purchaser the amount of his bid with interest, for which he gave a receipt upon the back of the certificate of sale, which he delivered to the plaintiff in error. In the spring of 1863, the parties had a settlement of all their copartnership matters except the claim of the plaintiff in error to be repaid one half of the amount paid by him to redeem said lands, and the balance due upon said notes. The plaintiff in error by the present suit seeks contribution for a moiety of the sum paid by him, and a set-off of the same against the amount due upon his notes. The liability of the parties to Roundy, Chabin, & Co., was a joint one, and it was the duty of each party to exonerate the other from a moiety of it. No act falling short of a complete exoneration of the one party and his property from so much of the liability as he was entitled to be exonerated from, will operate as a discharge of the other party from his obligation in that regard. The sale *en masse* of the lands of the defendant in error with those of the plaintiff in error did not discharge any part of the property sold, nor the parties from their respective duties. Neither party could obtain a discharge of his property without paying the whole amount of the purchase-money and interest, and each of them had the same right after the sale, within the time allowed by law, to redeem the lands for that purpose, as he had before that time to pay the debt to discharge himself from personal liability. The sale may have been irregular, and for that reason might have been set aside, but setting aside the sale would have revived the debt; and we are unable to discover any satisfactory reason for requiring the plaintiff in error to make the charge upon his property a personal debt against the defendant in error and himself, before satisfying it. The law does not require acts to be done, where there is no conceivable object to be gained by doing them. In the present case, the right to contribution is founded upon the duty of exoneration. The plaintiff in error has been compelled to pay money to exonerate his property from a liability; a moiety of which he ought to have been exonerated from by the defendant in error. The lands were discharged from the sale by the purchaser's accepting the redemption money. The statute pro-

viding a mode of evidencing the redemption may be enforced by an appropriate remedy, but a compliance with its provisions is not a condition precedent to the assertion of the right of plaintiff in error to contribution. The court below should have rendered a decree in favor of the plaintiff in error for the one half of the sums paid by him, with interest thereon from the time of its payment. The plaintiff in error was not entitled to the set-off claimed by the bill. There was no proof of the insolvency of the defendant in error, nor of any special equity requiring the set-off to be made. The demands were not necessarily connected with each other; that of the plaintiff in error arose out of the contract of partnership; that of the defendant in error from the sale of certain furniture, and there was no understanding between the parties that the one demand should be set off against the other. They were mere cross-demands. The obligation of the plaintiff in error was to pay his notes when they became due, without reference to the affairs of the partnership; and there is no equity shown for blending the two matters together, contrary to the agreement of the parties. The demand of the plaintiff in error was a legal one, and might have been set off at law, in action upon the notes: Collyer on Partnership, sec. 288. It is well settled that courts of equity will not set off mere cross-demands: *Rawson v. Samuel*, 1 Craig & P. 161.

The decree of the court below will be reversed, and the cause remanded.

Decree reversed.

EACH PARTNER IS ENTITLED TO REGARD the entire partnership property as held for his indemnity for the payment of joint debts. To this end, he has a lien on the partnership property: *Arnold v. Wainwright*, 80 Am. Dec. 448, and note 455, 456.

EQUALITY AMONG PARTNERS — PARTNER'S LIEN UPON PARTNERSHIP LANDS: *Williams v. Love*, 73 Am. Dec. 191, and note.

RIGHT OF PARTNER TO CONTRIBUTION from copartner upon payment of whole of firm debt: *Lawrence v. Clark*, 35 Am. Dec. 133.

SET-OFF IN EQUITY: See *Lockwood v. Beckwith*, 72 Am. Dec. 60; *Lee v. Lee*, 76 Id. 681, and note 684.

SET-OFF AT LAW: See *Milburn v. Guyther*, 50 Am. Dec. 681; *Dart v. Sherwood*, 76 Id. 228.

LIGHTNER v. STEINAGEL.

[38 ILLINOIS, 510.]

MONEY IN HANDS OF SHERIFF, paid him on the redemption of lands sold on execution, cannot be attached as the property of the plaintiff in the execution. But a surplus remaining in the hands of the sheriff after satisfying plaintiff's execution is liable to the garnishee process.

MONEY IN HANDS OF SHERIFF, collected on execution, is in the custody of the law, and is not the property of the execution plaintiff until paid over to him.

SHERIFF CANNOT BE CHARGED ON GARNISHEE PROCESS in respect to any money or property held by him in virtue of authority derived from law.

OFFICER HOLDING MONEY MERELY AS AGENT OF LAW is not subject to garnishee process. But if anything arises to change this relation from an official to a personal obligation, he then becomes amenable to such process.

DEBT. The opinion contains the facts.

Browning and Bushnell, for the plaintiff in error.

Buckley, Wentworth, and Marcy, for the defendants in error.

By Court, **BREESE, J.** The question presented by this record is, Is a sheriff, under the attachment laws of this state, liable to a garnishee process, for moneys in his hands collected as sheriff?

The merits of the question can be fully ascertained by the instructions asked on both sides, and the disposal of them by the court.

The plaintiff asked the court to give the following instructions:—

If the jury believe from the evidence in this case that the writ of attachment issued in this case was duly served on John Steinagel, as garnishee herein, before the said Richard A. Unger assigned and delivered to the said Charles S. Lips the certificate of purchase, mentioned in the answer of said Steinagel, filed herein, they will find a verdict for the plaintiff.

If the jury believe from the evidence in this case that the said Richard A. Unger assigned and delivered to the said Charles S. Lips the certificate of purchase mentioned in the answer of said Steinagle, garnishee herein, before the writ of attachment issued in this case was served on the said John Steinagel, as such garnishee, yet, if they also believe from said evidence that the said Unger so assigned said certificate of purchase to said Lips, without any good or valuable consideration whatever therefor, they will, in that case, find a verdict for the plaintiff.

That even if the jury believe from the evidence in this case that the said Robert Barth paid to the said John Steinagel, then sheriff of Adams County, at the time of said payment, the moneys in question in this case, as judgment debtor, to redeem from the sale mentioned in the said Steinagel's answer herein, and within twelve months from the time of said sale, under the laws of Illinois, still such payment to said Steinagel, while sheriff as aforesaid, would not prevent the said moneys or the avails thereof from being legally liable to be garnished in the hands of said Steinagel by the plaintiff or any attaching creditor of said Unger, provided the said moneys or the avails thereof in the hands of the said Steinagel belonged to said Unger at the time the said Steinagel was summoned as a garnishee in this case; and if the jury believe from the evidence in this case that at the time the said Steinagel was summoned as a garnishee in this case he had in his hands the said money, or the avails thereof, for the said Unger, and that the same, or the avails thereof, belonged to said Unger, they will find a verdict for the plaintiff.

The defendant asked the following:—

At the instance of the garnishee, John Steinagel, the court instructs the jury that, under the laws of this state, money paid to and received by a sheriff, in his official capacity as such sheriff, for the purpose of redeeming land from sale on execution, is not liable, while in the hands of such sheriff, to any process of garnishment, and if the jury believe from the evidence in this case that the money, in respect to which the garnishee, John Steinagel, has been garnished in this suit, was paid said Steinagel, as sheriff of Adams County, Illinois, by one Robert Barth, for the purpose of redeeming a tract of land in said county from a sale thereof, as the property of said Barth, made by a former sheriff of said county, on an execution against said Barth and one Anglerodt, and that said Steinagel, at the time of receiving said money, was sheriff of said Adams County, and received said redemption money as redemption money for the redeeming of said tract of land from the said sale on execution, they will find the issue for the garnishee.

The instructions asked by the plaintiff were refused, and that asked by the defendant was given, and on this ruling the errors are assigned.

The money in the hands of the sheriff was money paid him on the redemption of certain lands which he had sold on an execution.

This court has decided in *Reddick v. Smith*, 3 Scam. 451, that money in the hands of a sheriff collected on execution cannot be attached as the property of the plaintiff in the execution, because the money is in the custody of the law, and subject to the control of the court from which the execution issues; and because, to allow it to be done, might bring different tribunals into collision, and cause much embarrassment to officers concerned in the execution of final process. The same doctrine is held in the case of *Wilder v. Bailey*, 3 Mass. 289; in *Dawson v. Holcomb*, 1 Ohio, 275 [13 Am. Dec. 618]; and *Ross v. Clarke*, 1 Dallas, 354; *Marvin v. Hawley*, 9 Mo. 382 [43 Am. Dec. 547]. The specific money in the hands of the sheriff is held, in these cases, not to be the property of the plaintiff in the execution until paid over to him.

In *Pierce v. Carleton*, 12 Ill. 358 [54 Am. Dec. 405], this court recognized the doctrine of these cases, but held that a surplus remaining in the hands of the sheriff, after satisfying the plaintiff's execution, was liable to the garnishee process. And the reason given is, when the amount due on the judgment is returned into court or paid over to the plaintiff, the execution has accomplished its office, and if there is a surplus, it is the duty of the officer to pay it over to the defendant. It is not strictly in the custody of the law, but the officers hold it as so much money had and received for the use of the defendant. The same doctrine was held in the case of *Jaquett v. Palmer*, 2 Harr. (Del.) 144; *King v. Moore*, 6 Ala. 160 [41 Am. Dec. 44]; *Tucker v. Atkinson*, 1 Humph. 300 [34 Am. Dec. 650]; *Watson v. Todd*, 5 Mass. 271; *Crane v. Freese*, 16 N. J. L. 305; *Hurlbert v. Hicks*, 17 Vt. 193 [44 Am. Dec. 329]; *Woodbridge v. Morse*, 5 N. H. 519; *Fieldhouse v. Craft*, 4 East, 510; *Clymer v. Willis*, 3 Cal. 363 [58 Am. Dec. 414]; *First v. Miller*, 5 Bibb, 311; *Dubois v. Dubois*, 6 Cow. 494.

It is contended by the plaintiff in error that this case of *Pierce v. Carleton*, 12 Ill. 358 [54 Am. Dec. 405], is authority for the instructions asked for by him, and supports the views he has addressed to the court, and this because the sheriff is not required to bring the redemption money into court, and that it is in no sense in the custody of the law, nor has the court any control over it in his hands, nor can different courts be brought into collision in respect to it, nor, if garnished, can any delay or inconvenience be thereby created in the settlement by an officer under final process. It is said the sole duty of the officer is to pay the money over to the purchaser.

In this argument the facts seem to be lost sight of that the sheriff receives this money as an officer of the law, and is amenable to the law to account for it. His authority to receive it is derived directly from the statute. He is the mere agent of the law discharging a duty and a trust which arise alone from the statute, and not from any contract with or trust reposed by the judgment debtor or any of the parties to the judgment or sale. As to this money, the sheriff is amenable to the summary jurisdiction of the court, and on a proper case made there may be required to produce the money in court. His duty in regard to the receipt of money on the redemption of land sold by him on an execution arises out of the execution; and until he has discharged it in all its parts, and in its whole extent, he must be held to be under the control of the court. It is not like the case where he has collected of a defendant more money than the execution demanded. There, in such case, as was held in *Pierce v. Carleton*, 12 Ill. 358 [54 Am. Dec. 405], the money belonged to the defendant, which the sheriff was bound to pay over to him immediately. Here the money is subject to the final disposition of the court out of which the execution issued.

We think the true rule in such case is, that where the sheriff derives his authority from the law, he must exercise it according to the rules of law. So situated, public policy requires he should not be charged on garnishee process in respect of any money or property held by him in virtue of that authority; as such, it is in the custody of the law: *Drake on Attachments*, 506, c. 21, and cases cited.

From the authorities we deduce the principle that whenever an official holds money merely as the agent of the law, he cannot be subject to the process; but if anything arises to change this relation from an official obligation to a personal liability, then he would become amenable to this process.

In every view we have been able to take of this case, we can see nothing which should render the sheriff amenable to this process. The money was in the custody of the law, and no demand of it was ever made by the party entitled. The sheriff was but in the discharge of his duty in holding it. The circuit court properly instructed the jury on all the points made, and its judgment must be affirmed.

Judgment affirmed.

MONEY IN HANDS OF SHERIFF, collected under execution, is not subject to attachment or garnishment as a debt due to the plaintiff in execution, but

is in the custody of the law until finally and properly disposed of: *Olymer v. Willis*, 58 Am. Dec. 414, and note; *Hill v. La Crosse etc. R. R. Co.*, 80 Id. 783, and note 785; *Zschocke v. People*, 62 Ill. 129, citing the principal case.

SURPLUS MONIES REMAINING IN HANDS OF SHERIFF after satisfaction of the execution are subject to attachment or garnishment: *Tucker v. Atkinson*, 34 Am. Dec. 650; *King v. Moore*, 41 Id. 44; *Pierce v. Carleton*, 54 Id. 405, and notes to these cases.

MONEY IN CUSTODY OF LAW CANNOT BE ATTACHED: *Bowden v. Schatell*, 23 Am. Dec. 170, note 180.

SHERIFF CANNOT BE GARNISHED as debtor of plaintiff where he has collected money for him on an execution: *Marvin v. Hawley*, 43 Am. Dec. 547, and note 550. Money in the hands of a sheriff or other officer collected and held by him by virtue of his office, is in the custody of the law, and not subject to garnishee process: *Walsh v. Horine*, 34 Ill. 243; *Triebel v. Colburn*, 64 Id. 378; *Weaver v. Davis*, 47 Id. 237. But if anything arises to change his liability from an official to a personal one, he is then amenable to such process: *Weaver v. Davis*, *supra*; *Triebel v. Colburn*, *supra*. Money in the hands of the sheriff, collected on the redemption of lands sold under execution, is not subject to garnishment: *Millison v. Fisk*, 43 Id. 117, all citing the principal case.

COOLEY v. WILLARD.

[84 ILLINOIS, 63.]

GENERAL AGENCY TO LOAN MONEY AND TAKE SECURITY FOR ITS PAYMENT does not imply an agency to collect money.

AGENCY OF PERSON TO COLLECT MONEY IS NOT TO BE INFERRED FROM FACT of his loaning money of his principal and taking a note, a power of attorney to confess judgment, and a deed of trust as security; and the fact that he has received installments of interest from the debtor, and paid them to the creditor, is as much evidence that he was in this respect the agent of the debtor as of the creditor; and therefore the payment of the note to such person by the debtor is at his peril, and if the money is not paid to the holder of the note, equity will not enjoin the collection of a judgment confessed on the note.

DEBTOR WHO PAYS MONEY TO PERSON NOT AUTHORIZED TO RECEIVE IT, and without inquiry into his authority, must bear the loss if such person appropriates the money to his own use.

BILL in chancery by Cooley against Willard and the sheriff, Leach, to enjoin the collection of a judgment confessed by virtue of a power of attorney against Cooley, and in favor of Willard. At the hearing, a decree was rendered dissolving the injunction, and dismissing the bill. The complainant appealed. The opinion states the case.

Snapp and Breckenridge, for the appellant.

George F. Bailey, for the appellee.

By Court, WALKER, C. J. This bill was exhibited to enjoin the collection of a judgment upon a note alleged to have been previously paid, and to compel the note and deed of trust given to secure its payment to be surrendered to complainant. It appears that Paschal Woodward, acting for appellee, loaned to appellant the money, took his note, with a power of attorney to confess a judgment in case of a default in its payment, and also a deed of trust on real estate as security for the sum thus loaned. It likewise appears from the evidence that appellant paid the several installments of interest, as they fell due, to Woodward, who paid them to appellee, who indorsed them upon the note as paid by the hands of Woodward. Appellant, at the maturity of the note, paid the entire sum necessary for its satisfaction to Woodward, who agreed to get the note and deliver it to him. But he never did, nor did he pay the money to appellee.

There is no proof that Woodward was authorized to receive this money, but that was attempted to be shown by proof that he was appellee's general agent. The witness, S. W. Woodward, testified that it was his impression that Paschal Woodward loaned and collected money for appellee in numerous instances. He was, however, only able to give the names of persons to whom he had loaned money, but could name no person of whom he had made collections, except appellant. Appellee denies such authority by his answer, and we think this evidence fails to establish such authority. It may show a general agency to loan money and take securities for its payment, but not to collect for appellee. The fact that he received the money of appellant and paid it to appellee is as much evidence that he was the agent of the former as the latter.

Nor can it be inferred, because the power of attorney and the deed of trust were given to Woodward, that he was empowered to collect the money. Such is not claimed to be the effect of such instruments, unless it is so expressed in them. Appellant having intrusted Woodward with the money, if designed as a payment, he should have looked to his authority before he gave him the money, and if he had no such authority the risk was his, and not appellee's. Had he called for and insisted upon the production of the note, he would have learned that it was not in Woodward's possession, which would have been sufficient to put him upon his guard. It is a familiar rule, that where one of two innocent persons must suffer loss through the wrong of another, the party who en-

abled the person to commit the wrong must sustain the injury. In this case, appellant enabled Woodward to appropriate this money to his own use, and failed to see whether he was authorized to receive it, and must therefore submit to the loss. No reason is perceived for reversing the decree of the court below, and it is therefore modified, so as to dismiss the complainant's bill without prejudice, and as modified, the decree is affirmed.

Decree modified.

SPECIAL AGENT CAN BIND PRINCIPAL ONLY TO EXTENT OF AUTHORITY CONFERRED: *Savings Fund Society v. Savings Bank*, 78 Am. Dec. 390, and note 399. And a person dealing with an agent is bound to inquire as to the extent of his authority: *Reits v. Martin*, 74 Id. 215, and note 218.

VOGLE v. RIPPER.

[34 ILLINOIS, 100.]

EFFECT OF ALTERATION OF WRITTEN INSTRUMENT DEPENDS UPON ITS NATURE, the person by whom and the intention with which it was made.

ALTERATION OF WRITTEN INSTRUMENT MAY BE CONSIDERED AS IMMATERIAL, if neither the rights or interests, duties or obligations, of either of the parties are in any manner changed.

ALTERATION OF INSTRUMENT BY STRANGER SHOULD NOT CANCEL DEBT of which the instrument was merely evidence.

MATERIAL ALTERATION OF INSTRUMENT FRAUDULENTLY MADE BY ITS HOLDER deprives the wrong-doer of all rights by virtue of it, and he cannot supply its place by other evidence.

MORTGAGEE WHO FRAUDULENTLY ALTERS OR DESTROYS MORTGAGE NOTES thereby releases and discharges the debt and cannot sustain a bill to foreclose the mortgage which is a mere incident of the debt.

INTENTION WITH WHICH ALTERATION OF INSTRUMENT IS MADE IS MATERIAL FACT; and if the alteration is not fraudulent, although the identity of the instrument may be destroyed, it will not operate to cancel the debt of which the instrument is merely evidence.

MATERIAL ALTERATION OF MORTGAGE NOTES, IF NOT FRAUDULENT, will not operate as a discharge of the debt and mortgage.

COMPLAINANT HAS RIGHT TO HAVE NOTICE UPON RECORD, in a precise and unambiguous manner, of the conclusions of fact intended to be drawn from allegations in the answer.

ANSWER TO BILL TO FORECLOSE MORTGAGE DENYING THAT ALTERATIONS IN MORTGAGE NOTES were made by the consent of the parties, as alleged in the bill, but not averring that they were fraudulently made, does not put in issue the intention with which they were made, and the court will not consider the evidence in regard to it.

BILL in chancery to foreclose mortgage decree rendered in favor of the complainant, and error assigned by the defend-

ant, Vogle, who claimed that the mortgage had been discharged by reason of alterations made in the notes secured by the mortgage after they had been executed, so that they drew ten per cent instead of six per cent interest. The opinion states the case.

H. M. Wead, for the plaintiff in error.

C. A. Roberts and R. W. Ireland, for the defendant in error.

By Court, BECKWITH, J. The effect of an alteration in a written instrument depends upon its nature, the person by whom, and the intention with which, it was made. If neither the rights or interests, duties or obligations, of either of the parties are in any manner changed, an alteration may be considered as immaterial. It has been considered that even an immaterial alteration, if fraudulently made, would annul the instrument (2 Parsons on Notes and Bills, 572); but this opinion has not been uniformly adopted; and it has been held that the motive cannot be inquired into, unless the act itself materially affects the rights of parties: *Moye v. Herndon*, 30 Miss. 110. An alteration by a stranger ought not to destroy the rights of innocent parties: 2 Parsons on Notes and Bills, 574. There is a conflict of opinion regarding the existence of a right of action on an instrument which has been altered by a stranger; but whatever may be considered as the correct rule in that regard, we are unable to perceive any good reason why such an alteration should cancel a debt, of which the instrument was merely evidence: *Davidson v. Cooper*, 11 Mees. & W. 778. It ought to be regarded as a spoliation. A material alteration of an instrument, fraudulently made by its holder, justly deprives the wrong-doer of all rights by virtue of it. The identity of the instrument is thereby destroyed, and courts will not assist persons who have been guilty of a fraud to carry out the transaction wherein it was perpetrated. A party who voluntarily and fraudulently destroys the evidence of a debt agreed upon by the parties, ought not to be allowed to supply its place by other evidence: 2 Parsons on Notes and Bills, 572; *Waring v. Smyth*, 2 Barb. Ch. 185 [47 Am. Dec. 299].

In a court of equity a mortgage is regarded as an incident of the debt, and where a mortgagee has released or discharged the debt by a fraudulent alteration or destruction of the written evidence of it, he ought not to be permitted to sustain a

suit for its recovery; but where the alteration was not fraudulent, although the identity of the instrument may be destroyed, we think it should not cancel a debt, of which the instrument was merely evidence. If there was no attempt to defraud, there is no reason why a court should not assist the creditor as far as it can consistently.

In the case under consideration, it was urged in argument that the alterations were fraudulently made. The bill alleges that the notes were altered with the assent of Vogle and Heisel, so as to bear interest at the rate of ten per cent instead of six per cent, as they were originally written. The answers deny that the alterations were made by consent, but do not aver that they were fraudulently made. While the answers aver that the identity of the notes is destroyed, they do not aver that it was fraudulently done. The complainant has a right to have notice upon the record, in a precise and unambiguous manner, of the conclusions of fact intended to be drawn from allegations in an answer. The defendant is not required to state conclusions of law which he would deduce from the facts set forth; but if he states in his answer certain facts as evidence of a particular case, which he represents to be the consequence of such facts, and on them rests his defense, he is not afterwards at liberty to use the same facts for the purpose of establishing a different defense from that to which he has drawn the complainant's attention by his answer: 2 Daniell's Ch. Pr. 815; *Bennett v. Neale*, Wightw. 324. We think the intention with which the alterations were made is a material fact. The character of the act, and the effect of it, depend upon the intention with which it was done. As the intention is not put in issue by the answer, it would be improper for us to consider the evidence in regard to it.

The decree of the court below was for the sum which would have been due upon the notes, if they had not been altered, and the testimony of Stanberry relating to the alterations merely, and the intention with which they were made, was immaterial, and was in no way relied upon in the conclusion to which the court arrived.

The complainant failed to sustain the allegations of his bill by which he sought a decree for a greater sum, and the defendant cannot complain that the evidence adduced in support of such allegations was inadmissible. The decree was rendered for the sum due, and it is affirmed.

Decree affirmed.

MATERIAL ALTERATION IN INSTRUMENT BY PARTY THERETO DESTROYS IT: See *Wilkinson v. Smith*, 78 Am. Dec. 478, and cases cited in the note 486. **Material and immaterial alterations, what are, and effect of:** See *Reed v. Roark*, 65 Id. 127, and note 128, 129. **Immaterial alterations will not invalidate:** Id. A plea of fraudulent alteration is bad unless it alleges that the alteration was made without the other party's consent: Id. An alteration of an instrument by a stranger to it is, however, merely a mutilation: *Medlin v. Platts Co.*, 40 Id. 135. The principal case is cited to the point that an alteration in a note, though it may be material, if not made with an intent to injure or deceive, will not prevent a recovery for the debt, even if the note cannot be used as evidence: *Wallace v. Wallace*, 8 Bradw. 72.

COMPLAINANT IN EQUITY IS ENTITLED TO FULL AND UNAMBIGUOUS ANSWER, and the defendant cannot avail himself of a defense not pleaded: See *Kelghler v. Savage Mfg. Co.*, 71 Am. Dec. 600, and note 607.

FORBES v. HALL.

[34 ILLINOIS, 159.]

ONE WHO, WITH FULL KNOWLEDGE OF FACTS, MAKES ENTRY UPON AND OBTAINS PATENT for public land upon which a prior entry has been made, which has been canceled by mistake, will hold the legal title in trust for the prior entryman or his assignee.

ENTRY ON PUBLIC LAND CANCELED BY MISTAKE IS, if not abandoned, in full force when the mistake is corrected, and a subsequent entry with notice cannot defeat it.

LAND-OFFICERS CANNOT, BY ANY ACT OF THEIRS, DIVEST EQUITY OF PRIOR ENTRYMAN without his consent.

ONE FRAUDULENTLY MAKING SECOND ENTRY ON PUBLIC LANDS has no claim against prior entryman for purchase-money and taxes paid.

BILL TO COMPEL CONVEYANCE OF LEGAL TITLE FROM TRUSTEE may be sustained, though no demand for the title is made before suit brought, but the complainant will be subjected to costs.

BILL by Hall to compel the defendant, Forbes, to convey to him the legal title to certain land. The land in question, which had formed a portion of the public lands of the United States, was, on the 26th of September, 1853, entered and paid for at the proper land-office by Cheeny, and he, on the 24th of March, 1854, conveyed it to the complainant, Hall, who went into possession and has ever since occupied it, claiming under this entry and conveyance to him. On the 23d of December, 1854, however, this entry was canceled by the commissioner of the general land-office, on the ground that the tract had been selected by the state as swamp-land under the act of September 28, 1850. But this cancellation was made by mistake, this land not having been so selected by the state. On the 15th of January, 1855, however, Forbes, the defendant,

was allowed to enter this land at the land-office, and a patent issued to him. In making his entry, Cheeny had made use of the services of Forbes. When he arrived at the land-office for the purpose of making his entry, he found it closed, and thereupon made out his application in writing, and left it and the money with Forbes to make the entry, taking from Forbes a receipt therefor; and Forbes entered the land for Cheeny, and sent him the land-office receipt. In the latter part of the year 1855, Cheeny received a letter from the land-office, notifying him of the cancellation of his entry, and also a letter from Forbes, informing him that he had entered the land, and offering it to Cheeny for \$150. The court decreed in accordance with the prayer of the bill, and the defendant assigned error.

Glover, Cook, and Campbell, for the plaintiff in error.

R. E. Williams and A. B. Ives, for the defendant in error.

By Court, BREESE, J. The counsel for the plaintiff in error have argued this case as though it was an attempt to establish a resulting trust. Nothing of that kind is claimed. The question is, Has Hall the superior equity as against the legal title? If he has, then it was the duty of the court to regard Forbes as the trustee of that title for the benefit of Hall, and to decree it out of him for Hall's benefit.

The facts are uncontroverted. Forbes knew of the entry by Cheeny; in fact, he paid Cheeny's money into the land-office for the land, and took the receipt in Cheeny's name. This entry was never abandoned, and though canceled by mistake, when the mistake was corrected, Cheeny's entry was in full force. The subsequent entry by Forbes cannot defeat Cheeny's right thus legally acquired. Of Cheeny's rights Forbes had full notice, and that is sufficient to make him a trustee for Cheeny, or for his assignee, Hall. The land-officers, the entry being legal, could not by any act of theirs divest the equitable title acquired by Cheeny without his consent, or the consent of his assignee, and the right exists in Hall to pursue the legal title into the hands of Forbes, who acquired it with full notice. The case of *McDowell v. Morgan*, 28 Ill. 532, is "on all fours" with this case. The plaintiff in error cannot be permitted to hold the legal title he has acquired against the older equity of defendant in error.

Though the answer of plaintiff in error was sworn to, yet, as it does not deny any material allegation in the bill, the doo-

trine that it must be overcome by two witnesses has no application. As to the denial of a demand for a conveyance before suit brought, this will inure to the benefit of plaintiff in error, so far as to relieve him from the payment of costs in the court below, but no further.

We are not disposed to allow the claim of the plaintiff in error to the purchase-money and taxes he avers in his answer he has paid on this land. It is very evident that the plaintiff in error, contrary to equity and good conscience, with full knowledge of all the facts and circumstances attending the entry and purchase of the land by the defendant in error, bought to deprive the defendant of it most unjustly, and in a mode thoroughly tinctured with fraud. We do not, therefore, think he is in a position to claim the equitable interposition of this court, or that such conduct furnishes a just foundation for the relief he seeks.

The averment in the answer that complainant did not make any demand for the title before suit brought, and no proof produced that he did make such demand, can have no other effect than to relieve the plaintiff in error from the payment of the costs, which the circuit court did by adjudging the costs against the defendant in error.

Perceiving no error in the decree, it must be affirmed.

Decree affirmed.

PATENT TO PUBLIC LANDS MAY BE IMPRACHED IN EQUITY for fraud or collusion in obtaining it: *State v. Bachelder*, 80 Am. Dec. 410, and note 423. A patent is better legal title than prior entry, but equity will compel a conveyance of the patentee's title when it was obtained under circumstances sufficient to make him trustee for the party making the prior entry: *Carmas v. Johnson*, 61 Id. 593, and note citing prior cases 597.

WHERE COMMISSIONER OF GENERAL LAND-OFFICE CANCELS ENTRY WITHOUT AUTHORITY, such cancellation is a nullity, and the entry is not affected thereby: *Perry v. O'Hanlon*, 49 Am. Dec. 100. The principal case is cited to the point that the acts of land-officers, in canceling patents or certificates of entry, may be presumed to be regular and valid, but they are not conclusive, inasmuch as in so doing they are not exercising judicial functions, and if such acts are shown to be invalid and erroneous, the courts will not be bound thereby: *Aldrich v. Aldrich*, 37 Ill. 38; *Robbins v. Bunn*, 54 Id. 51.

BERGEN v. RIGGS.

[84 ILLINOIS, 170.]

POSSESSION OF CHATTELS CREATES PRESUMPTION OF OWNERSHIP; but the *prima facie* case may be rebutted by circumstances attending the possession, or by positive proof.

BURDEN OF PROOF IS UPON PLAINTIFF IN ACTION FOR BREACH OF IMPLIED WARRANTY of title on sale of chattel to show ownership in some other person where the defendant was in possession at the time of the sale, unless the circumstances attending the possession rebut the presumption of ownership created thereby.

PRESUMPTION OF OWNERSHIP ARISING FROM POSSESSION OF HORSE is overcome by the unexplained existence of the government brand upon the horse.

POSSESSION OF PERSONAL PROPERTY CREATES NO BAR BY LIMITATION AGAINST GOVERNMENT, though long and uninterrupted possession might raise the presumption that the government had parted with its title.

WHERE DEFENDANT'S POSSESSION OF PERSONAL PROPERTY IS ACCOMPANIED BY SUCH CIRCUMSTANCES as rebuts the presumption of ownership, it is error to instruct the jury, in an action for breach of implied warranty of title on a sale thereof, that possession is *prima facie* evidence of ownership, and that the burden is upon the plaintiff to prove title in another, such instruction being calculated to mislead.

CASE on promises for a breach of an implied warranty of title on the sale of a horse by the defendant in error to the plaintiffs in error. Verdict for the defendant. The opinion states the case.

T. G. Frost, for the plaintiffs in error.

A. G. Kirkpatrick, for the defendant in error.

By Court, WALKER, C. J. It is insisted that the third instruction given for defendant below is erroneous. It asserts that possession of personal property is *prima facie* evidence of ownership, and if defendant had possession for about one year prior to the sale, then, in order to overthrow such *prima facie* case, it was incumbent on plaintiffs to prove that the title to the horse was not in the defendant, but in the United States government. As a general proposition, possession of chattels creates a presumption of ownership, slight, it may be, but sufficient until overcome by proof. Yet the *prima facie* case may be rebutted by the circumstances attending the possession. It may be rebutted by evidence either circumstantial or positive, but until rebutted it is evidence of ownership.

If defendant in error was in possession as owner, then it raised the presumption of ownership, which plaintiffs in error

were bound to rebut by showing that the ownership was in some other person, unless the circumstances rebutted the presumption. The evidence shows that the animal was marked with the government brand indicating that it was the owner. The army regulations require that all such property, as soon as acquired by the government, shall be so marked, which is for the obvious purpose of identifying it as property belonging to the general government. If this brand of the government was found upon this animal, that fact would, unexplained, overcome the presumption of ownership created by mere possession, but long and uninterrupted possession or other circumstances may overcome the presumption of ownership in the government, but will not bar its right to recover the property. The regulations also provide that when property for any reason is no longer needed by the government, or has become unfit for use, it is condemned and sold by the proper officer. And proof of such sale would overcome the presumption of ownership by the government. That proof may be made by any legitimate evidence establishing such sales.

By the regulations of the service, when property is condemned it is required to be branded with the letter "C," which, if shown, is evidence that the government has parted with the title, when found in the possession of an individual. This presumption, it is true, may be rebutted by evidence. But in this case, the government brand indicating that it was the owner, being found upon the animal, was evidence which rebutted the presumption of ownership created by possession of the property. And with this evidence of ownership in the government, possession for a year would not overcome the presumption that the government was still the owner. The evidence to overcome the presumption created by possession was present, and went with the possession during its continuance. Possession creates no bar by limitation against the government, and even if it could, one year is not sufficient.

This instruction, as given, was calculated to mislead, and we think did mislead, the jury. It should have been refused, or so modified as to have informed them that the government brand indicating ownership overcame the presumption created by possession. As the case will be passed upon by another jury, we deem it improper to discuss the weight of evidence in the case. The judgment is reversed, and the cause remanded.

Judgment reversed.

POSSESSION OF PERSONAL PROPERTY IS MERELY PRIMA FACIE EVIDENCE OF OWNERSHIP: *Wright v. Solomon*, 79 Am. Dec. 196, and note 203; *Dick v. Cooper*, 64 Id. 652, and note 655.

WARRANTY OF TITLE IN CHATTEL IS BROKEN WHEN PURCHASER IS ACTUALLY DISPOSSESSED by a better title, whether there is a recovery at law or not: *Reed v. Staton*, 9 Am. Dec. 740.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST UNITED STATES: *Smith's Adm'rs v. De La Garza*, 65 Am. Dec. 147; *United States v. White*, 37 Id. 374.

JONES AND CULBERTSON v. COUNCIL BLUFFS BRANCH OF THE STATE BANK OF IOWA.

[34 ILLINOIS, 312.]

PROMISE BY DRAWEE TO PAY EXISTING BILL AMOUNTS IN LAW TO ACCEPTANCE, whether the bill was taken upon the faith of the promise or not; and a promise to any person interested in having the bill paid inures to the benefit of the holder.

DRAWEE IS NOT EXCUSED FROM ACCEPTING AND PAYING BILL in accordance with terms of his agreement, because of the non-performance of an agreement by the drawer, made at the same time, that the net proceeds of certain property transferred to the drawee shall amount to a certain sum.

JUDGMENT WILL NOT BE REVERSED BECAUSE DEMURRER HAS BEEN IMPROPERLY SUSTAINED to special pleas, where the appellant has had the full benefit of the matters set up in the special pleas, they having been given in evidence under the general issue.

ASSUMPSIT by Council Bluffs Branch of the State Bank of Iowa against Daniel A. Jones and Charles M. Culbertson on a bill of exchange which the appellants had promised to accept. Verdict and judgment were for the plaintiffs, and the defendants appealed. The bill was drawn by Green and Stone on Jones and Culbertson. The agreement was as follows: "Muscatine, Iowa, August 1, 1861. In consideration of Jones and Culbertson, of Chicago, Illinois, taking up George C. Stone's draft on Jones and Culbertson, and in favor of W. H. Hubbard, of Washington, Iowa, for two thousand eight hundred dollars, due August 3, 1861, and J. A. Green's draft on Jones and Culbertson, and in favor of T. Harback, calling for three thousand dollars, due August 17, 1861, and also paying draft drawn by us on Jones and Culbertson, and in favor of J. D. Lockwood, cashier, dated July 16, 1861, at sixty days, calling for \$2,050.25 [the bill in suit]. For the above and other considerations we release, relinquish, and transfer to said Jones and Culbertson, commission merchants, and resign to them all claim of whatsoever kind we have in said commission

house, and release the said Jones and Culbertson from any and all further obligations of whatsoever kind and nature with or through us, we only having had at any time the promise from Jones and Culbertson of a certain part of the profits arising from the commission house, in consideration of our influencing business to said commission house. We further say that we never have at any time put one dollar of capital stock into said house, our interest, as above stated, only being promissory by them for a part of the profits, if any should be made. Green and Stone." In other respects the case is sufficiently stated in the opinion.

Arrington and Dent, for the appellants.

Walker and Dexter, for the appellees.

By Court, BECKWITH, J. This is an action of *assumpsit*, to recover the sum of money mentioned in a draft dated July 16, 1861, drawn by Green and Stone on the appellants, alleged to have been verbally accepted by them, but protested for non-acceptance. The defense was, that the promise of the appellants to accept did not constitute an acceptance; that such promise was obtained by fraud, and that its consideration had failed. On the trial, the plaintiffs offered in evidence the draft and a written agreement of Green and Stone, dated August 1, 1861, by which they transferred to the appellants all their interest in certain property, and claims for commissions, in consideration of the appellants' undertaking to pay the draft in question. The plaintiffs also offered evidence tending to prove that the appellants promised Green and Stone that they would accept and pay the draft, and that the appellees, after they had taken it, were informed of this undertaking. A promise by the drawee to pay an existing bill is an acceptance, or in law amounts to an acceptance, whether the bill was taken upon the faith of the promise or not. A promise to any person interested in having a bill paid inures to the benefit of the holder. These principles were settled in the time of Lord Ellenborough; and a reference to any of the text-books will furnish the names of a great number of cases in which they have been acted upon in England and in this country. They are too well settled to be discussed at the present day. The court below found there was no fraud in obtaining the promise, and we are entirely satisfied with its finding. The appellants' agreement to accept the bill was for the benefit of its holders; and the agreement of Green and

Jones, that the net proceeds of the property and the commissions transferred to the appellants should amount to a certain sum, was solely for their benefit. The non-performance of the latter agreement furnishes no excuse for not accepting and paying the bill. The agreements were not intended to be dependent on each other. The undertaking on the part of the appellants was, that they would pay the bills when they became due. They were to convert the property transferred to them into money at the best price they could obtain for it, and ascertain the amount of the commissions; and if these sums did not amount to sufficient to pay the bills which they undertook to pay, Green and Jones undertook to pay them the difference. Such was the legal effect of their agreement. We do not deem it necessary to make a critical examination of the special pleas filed by the appellants. All the matters set up in them were admissible in evidence under the general issue, and on the trial were given in evidence under it. The appellants have had all the benefit which they can derive from the facts; and if the demurrer to some of the pleas was improperly sustained, we should not reverse the judgment after the appellants have had the full benefit of their defense under the general issue: *Atlantic Ins. Co. v. Wright*, 22 Ill. 462.

Perceiving no error in the record, the judgment of the court below will be affirmed.

Judgment affirmed.

PROMISE TO ACCEPT BILL FOR FIXED AMOUNT IS EQUIVALENT TO ACCEPTANCE: *Stemmer, Baker, & Co. v. Harrison*, 82 Am. Dec. 491, and note. The principal case is cited to the point that a parol promise to accept an existing bill is valid: *Nelson v. First National Bank*, 48 Ill. 40; see also *Barnet v. Smith*, 64 Am. Dec. 290, and note 297; *Wheatley v. Strobe*, 73 Id. 522.

ACCEPTANCE OF BILL OF EXCHANGE IS ABSOLUTE CONTRACT TO PAY, and parol evidence is not admissible to show that the acceptance was upon a condition: *Heuerin v. Donnell*, 45 Am. Dec. 302. It is presumptive evidence that the acceptor has effects of the drawer in his hands: *Kendall v. Galvin*, 32 Id. 141; *Griffith v. Reed*, 34 Id. 267; though as between the drawer and acceptor, this presumption may be rebutted by showing that the bill was accepted and paid for the drawer's accommodation: *Griffith v. Reed*, *supra*.

ERRORS NOT PREJUDICIAL ARE NOT GROUND FOR REVERSAL: *Speyer v. Thiele*, 81 Am. Dec. 157, and note 160; *Williams v. Carpenter*, 76 Id. 316, note 318; *English v. Johnson*, 76 Id. 574. The principal case is cited to the point that where all the evidence that was offered or could have been admitted under the special pleas was admitted under the general issue, the ruling sustaining demurrers to the special pleas cannot be urged as ground of reversal, since the error is not prejudicial: *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 447.

KUPFER v. BANK OF GALENA.

[34 ILLINOIS, 223.]

ACCEPTOR OF DRAFT IS REGARDED IN SAME LIGHT AS MAKER OF PROMISSORY NOTE, and is primarily liable thereon.

DRAWER OF BILL OF EXCHANGE MUST PAY IT IF DRAWEE DOES NOT, where his liability has been properly fixed, and no written promise on his part is necessary as in the case of a guaranty.

LIABILITY OF DRAWER ON BILL OF EXCHANGE where he has funds in the hands of the drawee is fixed, when the bill is duly presented to the drawee and payment refused, and the drawer duly notified of the refusal.

DRAWER HAVING NO FUNDS IN HANDS OF DRAWEE NOR EXPECTATION OF ANY is not entitled to notice of the refusal of payment by the drawee.

DRAWER IS BOUND BY PROMISE TO PAY DRAFT made with knowledge of non-acceptance by the drawee.

WHERE TWO BANKS KEEP RUNNING ACCOUNTS WITH EACH OTHER, and one of them, holding drafts of the other for collection, fails to pay over money received thereon, the remedy is against the defaulting bank, and not against the drawer of the draft.

WHERE ONE FORWARDS GRAIN TO ANOTHER, AND DRAWS ON HIM IN FAVOR OF BANK which advances money on the draft, the transaction cannot be regarded as a sale of the grain to the bank, so as to divest it of its remedy against the drawer if the drawee fails to pay the draft, or to oblige it to account for the value of the grain in a suit against the drawer.

DEPOSITOR IN BANK WAS ENTITLED TO RECEIVE GOLD COIN in return for gold coin deposited, or its equivalent in currency at its market value at the time it was drawn out, before the passage of the legal-tender laws.

ACTION by the Bank of Galena, of which N. Corwith was the president and manager, against Kupfer, upon five drafts drawn by Kupfer upon the Bank of Peru, and payable to the plaintiff. The appellant Kupfer was a wheat buyer at Galena, and purchased wheat for one Parks, who operated a flour-mill at La Salle. He wrote to Parks as follows: "I understood yesterday you made arrangements with the Bank of Galena to cash my drafts. After presenting your letter to N. Corwith & Co., I found out that they are going to take the drafts only under my own responsibility. As it is against my principles to sell grain on time, I would like you to make such arrangements here as to get the cash for the wheat on delivery." The only arrangements made by Parks were that he went to Galena and showed to Corwith at his bank the following letter of credit: "Bank of Peru, Peru, Ill., June 7, 1860. R. G. Parks is hereby authorized by himself or his agent to draw on this bank at not exceeding one dollar per bushel for wheat at Dunleith, Galena, or Warren, accompanied by Illinois Central Railroad receipts for the same, at such time as he shall arrange.

Said drafts to be sent direct to this bank for collection. N. R. Haskell." After this the appellant shipped grain to the Bank of Peru for Parks, consigning it to the Bank of Peru, and drew drafts upon this bank to the amount of the cost of the wheat, payable to the order of Corwith & Co., of the Bank of Galena. The Bank of Galena cashed these drafts and forwarded them with railroad receipts for the grain shipped attached thereto to the Bank of Peru for collection, and charged them to the Bank of Peru, and when they were paid, credited the Bank of Peru with the amount. The Bank of Peru charged the drafts to Parks. Parks paid forty-six of these drafts to the Bank of Peru, two of them being among the five sued on. These two drafts, it was proved, were paid by Parks to the Bank of Peru, but the appellee claimed that it had not received payment for these two drafts or for the other three sued on. It was proved that wheat to the amount of these drafts had been shipped to the Bank of Peru as consignee, and had been received by Parks by means of an order from the cashier of the Bank of Peru upon the railroad company. Testimony was introduced by the appellee tending to show that Corwith of the Bank of Galena told the appellant that he would not take appellant's drafts except upon his own responsibility, and that the appellant accordingly agreed to guarantee them, and also that on another occasion the appellant promised Corwith to pay the drafts in suit. It also appeared in evidence that the appellant had deposited seventeen hundred dollars in American gold with the appellee. When currency was deposited, according to the rule of the bank the depositor could draw only for currency. The appellant drew out four hundred dollars in gold on his checks and the rest in currency, and the appellee appropriated the gold to the payment of the currency checks. At the time the appellant drew the gold, gold was at forty per cent premium, and at the time of the deposit it was at twelve per cent premium. The verdict was against the appellant, his motion for a new trial was overruled, and he appealed. The opinion in other respects states the case.

*L. Shissler, M. Y. Johnson, and E. S. Leland, for the appellant.
Glover, Cook, and Campbell, for the appellee.*

By Court, BREESE, J. Appellant makes these points: 1. The drafts, having been drawn under this letter of credit, signed by the Bank of Peru, are regarded as accepted drafts, and being accepted drafts, they became the debt of the Bank

of Peru, the acceptor being primarily liable. He is regarded in the same light as the maker of a promissory note. It is his debt. He is the party looked to for payment, and being the original debtor and primarily liable, a promise by any other person to pay them is a collateral promise, and must be proved to have been made in writing.

In support of this proposition, the following authorities are cited: *Russell v. Wiggin*, 2 Story, 213; *Bissell v. Lewis*, 4 Mich. 450; *Dennis v. Rider*, 2 McLean, 452; *Union Bank v. Coster*, 3 N. Y. 203 [53 Am. Dec. 280]; *Pierce v. Gibson*, 2 Ind. 408.

This proposition assumes that the drafts were drawn under the authority of the letter of the Bank of Peru, of the date of June 7, 1860. That authority is to R. G. Parks, or his agent, to draw. The jury have ignored the fact that appellant was the agent of Parks to draw these drafts, for that question was distinctly put to them by the appellee's third instruction. It was this: "In order to entitle the letter of credit referred to in this case to any consideration as evidence, the jury must be satisfied from the proof that the drafts sued on were drawn by the defendant, Kupfer, agent of R. G. Parks; and if the jury believe from the evidence that the drafts were drawn by Kupfer on his own responsibility, and that he was not the agent of R. G. Parks, then said letter of credit should be disregarded by the jury."

The fact is found by the jury that these drafts were not drawn by appellant, as the agent of Parks, on the letter of credit given by the Bank of Peru; consequently, they were not accepted drafts by that bank. The Bank of Peru at no time agreed to accept appellant's drafts. It follows, then, that those drafts were like other commercial paper, which, if not paid by the drawee, the drawer must pay. No question of original or collateral undertaking can arise in any such case, —no question of guaranty, and no question as to the nature of the guaranty, whether it must be in writing or may be by parol. The testimony to the point that Corwith would take the drafts only on the responsibility of appellant, and his alleged promise to guarantee them, amount to nothing; for by the very act of drawing he guaranteed their payment, and could be called on for payment on certain conditions; that having funds in the hands of the drawee, the drafts were presented to the drawee and payment refused, and he duly notified of the refusal. His liability is then complete. But if he had no funds in the hands of the drawee, nor the expecta-

tion of any, he would not be entitled to notice of the refusal of the drawee. And the reason is, having no funds, notice could do him no good; there was nothing in jeopardy which he might save by timely notice.

But the appellant had every reason to expect that there were funds in the hands of his drawee to meet these drafts when he drew them, as the railroad receipts for the wheat were transmitted at the same time, of value sufficient to pay them all. He was, then, entitled to notice of the refusal of the Bank of Peru to pay these drafts, and that is all he could claim. He occupied the position of any ordinary drawer of a bill, and nothing better. Did he have this notice? and what did he do when the fact was brought to his knowledge that the drafts were not paid? That he had notice is not denied, and that he promised to pay them in four months thereafter is proved. It is true, no formal notice was given appellant; but it is fairly inferable, from the conversation with Corwith in the Bank of Galena, that appellant well knew all the facts in relation to the non-payment of the drafts by the Bank of Peru, and with this knowledge he made the promise to pay them in four months: *Tebbetts v. Dowd*, 23 Wend. 379, and cases there cited.

It would seem, however, from the manner in which this trial was conducted in the various efforts to prove a guaranty of these drafts by appellant, that appellee really considered the Bank of Peru the party liable, and that it was necessary to their success they should prove a guaranty. And in truth, there was ground for such an idea, furnished by the repeated drafts drawn after the date of the letter of credit, and their payment by Parks, who was enabled to control the wheat sent forward to meet them. But their true position was that of holder of unpaid drafts, on which the drawer was responsible after their dishonor by the drawee, and notice thereof to the drawer.

The next point made by appellant is, that appellee cannot recover on the special counts on the bills of exchange against appellant, their sole remedy being against the Bank of Peru. The bills of exchange here spoken of are the drafts in suit, which are all counted on in the declaration, with proper averments of presentment, and non-payment, and notice to appellant, and a promise by him, with a knowledge of all the facts, to pay them.

If the views we have presented in discussing the first point

be correct,—and of this we do not doubt,—this point is disposed of also.

The drafts not being accepted drafts by the Bank of Peru, or if accepted not paid by that bank, the remedy over, by appellee against the drawer, cannot be disputed. The transaction with appellee does not appear to us to be of the character given to it by the appellant. He seems to think that by drawing these drafts and getting the money on them from the appellee, he was but selling his grain, whereas, it seems to us that this was the mode appellant resorted to, by which to raise money to purchase grain. The advances were all made by appellee on appellant's responsibility, and to inspire confidence in the drawee, the Bank of Peru, that the drafts had a sufficient basis to rest on; the receipts of the railroad were attached to and sent on with the draft, thereby assuring the Bank of Peru that value would be under their control sufficient to satisfy them. Such transactions are quite common, and sometimes greatly aid the enterprise of business men, and increase trade. In no light in which we can look at the transaction, can the appellee be considered as the purchaser of this grain. They advanced the money to purchase it, taking for their protection the drafts on the Bank of Peru, with railroad receipts to their value attached to them; and the drafts being all payable fifteen days after sight, the Bank of Peru, the consignee, was enabled in that time to get the funds to meet them, which they did do, in all but three cases, as Parks, for whose benefit the arrangement was made, took up the drafts as fast as presented, with the exception stated. How the transaction can be regarded as a sale by appellant of the grain to appellee, we cannot understand. When appellant wrote to Parks that it was against his principles to sell grain on time, and he, Parks, must make such arrangements at Galena as to get the cash for the wheat on delivery, had no reference to a sale of wheat at Galena; that is the place where it was bought, but it was to be delivered at La Salle, and an arrangement must be made at Galena, by which, when the wheat was delivered at La Salle, it would be paid for, and this arrangement was the letter of credit from the Bank of Peru, and which answered the purpose from June to November. Appellee was not buying grain, but furnishing funds to appellant with which he could buy it.

It is very apparent these banks kept running accounts with each other; and the appellees were creditors of the Bank of Peru for all the moneys received by that bank on account of

their drafts, and the Bank of Peru was the debtor to appellee for the same. This is undeniable. The balances in favor of appellee were met by money by express, by exchange on Chicago and elsewhere, and money was passing between them all the while. So says cashier Hunt. All these drafts were charged by appellee against the Bank of Peru, and the account credited by remittances. The drafts were sent with instructions to remit. When, therefore, the two drafts described in appellee's third and fourth counts, and which were produced on the trial, marked on their face "paid," and which Parks testified he had paid, when they were so paid to the Bank of Peru, that bank became the debtor of appellee for their amount; for it is apparent the Bank of Peru had this credit with the appellee all along, as the business progressed, until the 17th of November, 1860. For this amount, appellant is clearly entitled to a credit; for these his drafts were paid to the party, and in the mode and manner expected and understood by appellee; and if the Bank of Peru proved dishonest and unfaithful, the appellant is not implicated. His promise to pay the drafts only embraced such drafts as had not been paid; for it would be unreasonable to suppose he would, without a consideration, undertake and promise to pay drafts which had been paid in the mode and manner agreed upon. If appellee has not been so fortunate as to receive the proceeds, the loss must be his, and the judgment, to the extent of these two drafts, is erroneous, and must be reversed.

Another point made by appellant is, that the court erred in refusing to give appellant's fifth instruction, to the effect that the plaintiff below, before he could recover in this suit, if at all, must account for the value of the wheat.

From what we have already said, this instruction was properly refused, for appellee had nothing to do with buying or selling wheat. The receipts of the railroad were mere vouchers of the quantity of wheat shipped, which no party supposed the Bank of Galena was to go into the market with and sell. Appellee had nothing to do with the wheat, nor was it at any time agreed that the Bank of Galena should have anything to do with it. It was purchased for Parks, and he controlled the receipts after they were transmitted to the Bank of Peru. It is not true that appellee had control of this wheat, or any power to sell it. They did not receive the railroad receipts for any purpose of control, but for the purpose stated. Appellant never passed the wheat to appellee for so much money, nor

for any purpose, as the case plainly shows, consequently there is no obligation on appellee to account for the wheat, and the instruction was properly refused.

The other point made by appellant as the fourth, to the effect that Parks having taken up and paid two of the drafts sued on, no action could be maintained against the defendant, has been disposed of by allowing the same. The instruction should have been given so far as to tell the jury if any of these drafts had been paid to the Bank of Peru, then that bank became the debtors to the Bank of Galena for their amount, and Kupfer was not liable on them.

About the time these drafts should have been paid, the Bank of Peru sent a remittance to appellee, under date of November 21, 1860, of \$2,042.73, "for balance of account as advised." Now, as no officer of the Bank of Galena, or other person, has stated what balance this was, and when the cashier, who ought to know, fails to tell on what account this remittance was sent, but contents himself with saying it "was irrespective of any particular drafts," the inference is not a forced one that it was on account of these drafts. But be that as it may, the appellant is entitled to a credit for them.

The fifth point made by appellant is the refusal to give the instruction in regard to the right of appellant to have the difference allowed him between American gold and paper money.

This right, it seems to us, is very evident, very reasonable, and unquestionable. This deposit of gold coin was a special contract, to the effect that appellee would return the coin, or on failing to do so, appellant should be entitled to the value of the coin. The appellant was entitled, if he was paid in currency at a discount, to have the amount of that discount allowed to him, or in other words, he was entitled to receive of the bank the premium at which gold was sold over currency, and this for the whole amount deposited, unless he agreed to receive currency as coin. The bank had no right to make appellant's check for currency a charge against this deposit of gold. What the gold was worth over and above currency at the time appellant drew it out should be allowed. The several acts of Congress making treasury notes a legal tender in the payment of private debts were not then enacted; consequently, appellant was entitled to recover the value of the gold coin.

These are the principal points made by the appellant. Another, of minor consideration, is the admission of parol proof

of the contents of these drafts. We think the affidavits of Corwith were sufficient to let in such proof.

For the reasons given, the judgment of the court below is reversed, and the cause remanded for other proceedings not inconsistent with this opinion.

Judgment reversed.

NATURE AND EFFECT OF CONTRACT OF ACCEPTANCE: See *Swope v. Ross*, 80 Am. Dec. 567, and cases cited in the note 570. The acceptor is primarily liable: *Deersy v. Moor*, 74 Id. 157.

PRESENTMENT, NECESSITY OF, WHERE DRAWER HAD FUNDS IN HAND OF DRAWER: See *Adams v. Darby*, 75 Am. Dec. 115; *Hubble v. Forgatie*, 45 Id. 775; *Ray v. Bank of Kentucky*, 39 Id. 479; *Orear v. McDonald*, 52 Id. 703.

ACCEPTANCE IS UNNECESSARY TO CHARGE DRAWER OF BILL payable a certain period after date, but demand and notice at maturity are sufficient: *Commercial Bank v. Perry*, 43 Am. Dec. 168.

PROMISE BY DRAWER TO PAY DRAFT MADE WITH KNOWLEDGE OF FAILURE to make presentment is binding, and operates as a waiver: *Hunt v. Wadleigh*, 45 Am. Dec. 108; but not if made without knowledge: *New Orleans etc. Bank v. Harper*, 43 Id. 228; *Commercial Bank v. Perry*, 43 Id. 168.

DEPOSITS IN BANK, PAYABLE IN WHAT: See extensive note to *In the Matter of the Franklin Bank*, 19 Am. Dec. 421 et seq.; *Marine Bank v. Chandler*, 81 Id. 249.

LIABILITY OF BANK RECEIVING BILL OR NOTE FOR COLLECTION: See *Etina Insurance Co. v. Alton City Bank*, 79 Am. Dec. 328, and note 330; *West Branch Bank v. Fulmer*, 45 Id. 651; *Baldwin v. Bank of Louisiana*, 45 Id. 72; *Commercial Bank v. Martin*, 45 Id. 87, and notes; and see extensive note upon this subject appended to *Allen v. Merchants' Bank*, 34 Id. 308-317. Its liability for money collected: Id. 313.

MUNSON v. HARBOUN.

[34 ILLINOIS, 422.]

PROPERTY SEIZED UNDER FIERI FACIAS ISSUED FROM UNITED STATES CIRCUIT COURT cannot be replevied by process issued from a state court.

STATE COURT CANNOT LAWFULLY INTERFERE WITH EXECUTION OF FINAL PROCESS OF FEDERAL COURT for the protection of a stranger alleging that his property has been tortiously seized in execution to satisfy the debt of another. A remedy affecting the custody of the property, such as replevin, is exclusively within the jurisdiction of the federal court, though trespass or trover will lie in the state court against the marshal or his deputy for the wrongful seizure.

REPLEVIN. The plaintiff in error justified the taking under a writ of *fieri facias* issued from the circuit court of the United States for the northern district of Illinois, against one Wright. The question presented is the validity of this plea.

Hoyne, Miller, and Lewis, for the plaintiff in error.

Chester Kinney and James Fletcher, for the defendant in error.

By Court, BECKWITH, J. Munson, as deputy marshal, under a writ of *feri facias* from the circuit court of the United States for the northern district of Illinois, against the property of Wright, seized certain goods claimed by Harroun, who thereupon brought replevin in the state court.

We are of the opinion that the state court cannot lawfully interfere with the execution of final process of the federal court, at the instance and for the protection of a stranger alleging that his property has been tortiously seized in execution to satisfy the debt of another.

The question involved is not a new one; but if it were, we should have no difficulty in deciding it. The state and federal governments, while they are distinct parts of a complete system, are each supreme within the limits of the authority confided to them; each government is possessed of a judiciary power commensurate with its own objects and purposes, and partaking of its supreme authority; and the exercise of the judicial power in each is confided to the tribunals of the respective governments.

These tribunals are invested with the general as well as incidental powers necessary to the complete administration of justice; among these is the power of executing the final process of the court, whereby the execution is made the life of the law. And in order that all conflict between the two judicial systems touching the right of either to administer justice and execute its process to the exclusion of the other might be avoided, the ultimate power of determining the boundary line between the two jurisdictions was constitutionally vested in the courts of the United States, and their decision on that subject is conclusive.

Thus the judicial departments of the respective governments, so organized and adjusted with reference to each other, can never come in conflict while exercising only the authority rightfully belonging to them; and as a consequence, except in cases of appellate jurisdiction from the state to the federal courts, the courts of neither can have any right to interfere with or control the proceedings or process of the other: *Diggs v. Wolcott*, 4 Cranch. 178; *Peck v. Jenness*, 7 How. 612; *Freeman v. Howe*, 24 Id. 450.

While the property claimed by Harroun yet remained in the custody of the marshal who had seized and was holding it on final process out of the federal court, that court, so far as reaching the property itself, had the exclusive authority to inquire into and determine the question of the rightfulness of such custody, upon which the proper execution of its process depended. Had the defendant in error sought relief in that court while the property was thus held, he could have been protected in all his rights; if he did not choose to adopt that course, he still had his action of trespass or trover in the state court against the marshal or his deputy for the wrongful seizure. But since replevin would work an inference with the process of the federal court, that action cannot, in such case, be maintained.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

BREESE, J., dissented.

ONE COURT CANNOT TAKE PROPERTY FROM CUSTODY OF ANOTHER BY REPLEVIN or any other process, and property held by a United States marshal under a writ from a federal court cannot be taken from him by any process from a state court; and if surrendered upon a writ of replevin, the state court having custody of the property will order its return upon demand and a showing by the marshal of his authority for holding it: *Lewis v. Buck*, 82 Am. Dec. 73, and note 94. The principal case is cited to the point that state courts cannot enjoin proceedings in the courts of the United States, nor the latter in the former courts: *Logan v. Lucas*, 59 Ill. 233.

ANDERSON v. HAPLER.

[84 ILLINOIS, 436.]

REPLEVIN WAS COMMENCED AT COMMON LAW BY ORIGINAL WRIT issued out of the court of chancery, and issued only at Westminster; and to remove the inconvenience of procuring the writ when required in a distant part of the kingdom, the statute of Marlbridge was passed, which dispensed with the original writ, and substituted a proceeding, upon a complaint made to the sheriff, which was called a "proceeding by plaint."

"PLAINT," IN ILLINOIS STATUTE PROVIDING THAT REPLEVIN BE COMMENCED BY PLAINT, has the same meaning that it had under the statute of Marlbridge, and signifies a complaint that the goods or chattels were wrongfully taken or are wrongfully detained, which is made by means of the affidavit required by the statute.

OWNER OF LAND MAY BRING REPLEVIN FOR CHATTELS SEVERED FROM FREEHOLD, where there was no adverse possession, but not if the land was held adversely, for he cannot assert his title in that manner.

LANDLORD MAY BRING REPLEVIN FOR CHATTELS WRONGFULLY SEVERED FROM FREEHOLD by the tenant, as the title to the land is not thereby drawn in question, *semble*.

REPLEVIN by Hapler against Anderson and Waugh for the alleged wrongful detention of one hundred cords of wood. The defendants pleaded *non detinet*, and that the wood was not the property of the plaintiff, but belonged to the defendants. Verdict for the plaintiff, defendant's motion for a new trial, and in arrest of judgment overruled and error assigned by the defendants. An agreed statement of facts was filed, the court to decide upon the substantial merits of the cause. From this statement it appeared that the plaintiff proved *prima facie* title to certain land in himself by a regular chain of conveyance from the United States; and that after he had acquired such title, the defendant Anderson cut the wood in controversy from the land, and at the time it was replevied it was in the possession of the defendants, Anderson and Waugh. The defendants then offered in evidence, as color of title to the land, a tax deed to themselves, dated about a month before the plaintiff acquired title, and duly made, acknowledged, and recorded, and offered to show that a few days after the date of the deed they entered into the peaceable possession of the land in good faith, while it was vacant and unoccupied, and had remained in such possession for several months up to the time of the trial. This evidence, upon objection by the plaintiff's counsel, was rejected by the court; and the court also excluded the tax deed and certificates of sale when offered by the defendants as evidence of absolute title to the land; and the defendants excepted.

Burns and Cummins, and Bangs and Shaw, for the plaintiffs in error.

Milton T. Peters, for the defendant in error.

By Court, BECKWITH, J. At common law, the action of replevin was commenced by an original writ issued out of the court of chancery, directed to the sheriff of the county where the goods and chattels to be replevied were, commanding him to replevy and deliver them, and to cause the defendant to be brought to justice for their wrongful detention. An original writ was only issued at Westminster, and to remove the inconvenience of procuring one when required in a distant part of the kingdom, the statute of Marlbridge, 52 Hen. II., c. 21, was passed, which provided that if the beasts of any man were

taken and wrongfully withholden, the sheriff might, after complaint made to him thereof, deliver them without "let or gain-saying" of him who took the beasts. The original writ was thus dispensed with, and a proceeding upon a complaint made to the sheriff under the statute was called a "proceeding by plaint."

The revised statutes of this state (c. 88, sec. 5) provide that the proceedings in an action of replevin shall be commenced by plaint, and the word has the same meaning that it had regarding the proceedings under the statute of Marlbridge. It signifies that there is to be a complaint made that the goods or chattels were wrongfully taken or are wrongfully detained. Our statute requires an affidavit to be filed by the plaintiff, or by some one in his behalf, stating that he is the owner of the property about to be replevied, or that he is then lawfully entitled to the possession thereof, and that the same has not been taken for any tax, assessment, or fine levied by virtue of any law of the state, nor seized under any execution or attachment against the goods and chattels of such plaintiff, liable to execution or attachment. It is usual to state in the affidavit that the goods and chattels were wrongfully taken or are wrongfully detained, and in that manner the plaint mentioned in the statute is made.

It is a controverted question whether the action could be brought at common law for goods or chattels which had come lawfully to the possession of the defendant, and were only wrongfully detained. In New York, it was held that an action lay only for goods or chattels unlawfully taken and detained; and in Massachusetts, it was held to be a proper remedy for goods and chattels unlawfully detained, without reference to the mode by which the possession of the defendant had been acquired. Our statute gives the remedy where the goods or chattels have been wrongfully distrained or otherwise wrongfully taken, or shall be wrongfully detained. The possession of land was always a sufficient title thereto as against a stranger. The rightful owner could not forcibly enter and eject a disseisor, nor question his rights, excepting in a real or possessory action for the recovery of the land. The possessor of lands might bring replevin for chattels severed from the freehold; and as the ownership of lands drew to it the constructive possession, the owner might bring replevin for chattels thus severed where there was no adverse possession. But the owner could not bring replevin for chat-

tels severed from land in adverse possession of the defendant or of a third person. The law does not permit him to assert his title to the land against the person in adverse possession in that manner: *Morris on Replevin*, 57, 58; 1 *Smith's Lead. Cas.* 485; 1 *Ch. Pl.* 163; *Eaton v. Southby*, Willes, 131; *Snyder v. Vaux*, 2 *Rawle*, 427 [21 *Am. Dec.* 466]; *Vausse v. Russell*, 2 *McCord*, 329; *Mather v. Trinity Church*, 3 *Serg. & R.* 509 [8 *Am. Dec.* 663]; *Baker v. Howell*, 6 *Id.* 476; *Brown v. Caldwell*, 10 *Id.* 114 [13 *Am. Dec.* 660]; *Powell v. Smith*, 2 *Watts*, 126; *De Mott v. Hagerman*, 8 *Cow.* 220 [18 *Am. Dec.* 443]; *Davis v. Eassey*, 13 *Ill.* 192. Consistently with this rule, a landlord might bring replevin for chattels wrongfully severed from the freehold by a tenant, as the title to the land is not thereby drawn in question: *Langdon v. Paul*, 22 *Vt.* 205; *Sands v. Pfeifer*, 10 *Cal.* 258; *Sanders v. Reed*, 12 *N. H.* 558.

The judgment of the court is reversed, and the cause remanded.

Judgment reversed.

REMEDY FOR INJURIES TO REAL ESTATE HELD ADVERSELY TO PLAINTIFF.—

As a general rule, possession is requisite to the maintenance of any action for tort: 1 *Hilliard on Torts*, 518, 527; and this is especially true of actions for injuries to realty; and therefore, strictly speaking, an owner of land in the adverse possession of another has no remedy for injuries done to the realty by any person, so long as he remains out of possession; except that, as we shall see, he may, after regaining possession by re-entry or by virtue of a judgment, have an action for intermediate damages, and may also while ousted from the possession have his action for the trespass against his disseisor, for at the time of the ouster he was in possession.

The very gist of the action of trespass is the injury done to the plaintiff's possession: *Note to Orser v. Storms*, 18 *Am. Dec.* 546; 1 *Ch. Pl.*, 16th *Am. ed.*, 195; *Smith v. Wunderlick*, 70 *Ill.* 426. And in replevin and trover, the plaintiff must have the right to immediate possession: *Baxter v. Bush*, 70 *Am. Dec.* 429, note 432; *Alden v. Carver*, 81 *Id.* 430; note to *Harker v. Dement*, 52 *Id.* 678 et seq.; *Johnson v. Carnley*, 61 *Id.* 762, and note 766; *Hilliard on Remedies for Torts*, 20. Therefore, to maintain trespass *quare clausum fregit*, the plaintiff must have had possession of the land at the date of the alleged trespass, and while the land is in the adverse possession of another, the owner cannot bring trespass for injuries done during that period, for two persons claiming adversely cannot have possession at the same time, and accordingly during the period of adverse occupancy, trespass will not lie in behalf of the owner against either the adverse occupant or any one else: *Litchfield v. Ready*, 5 *Ex.* 939; *Cannon v. Hatcher*, 26 *Am. Dec.* 177; *Stean v. Anderson*, 4 *Harr. (Del.)* 209; *Davis v. Eassey*, 13 *Ill.* 192; *Robertson v. Rodes*, 13 *B. Mon.* 325; *Carpenter v. Smith*, 40 *Mich.* 639; *Bynum v. Carter*, 4 *Ired.* 310; *Masterson v. West End etc. R. R. Co.*, 5 *Mo. App.* 575; *Rowland v. Rowland*, 8 *Ohio*, 42; *Caldwell v. Walters*, 22 *Pa. St.* 380; *Hosford v. Whitcomb*, 56 *Vt.* 651; 1 *Hilliard on Torts*, 528, 530. The possession of the party at the time of the injury of which he complains is an essential pillar of the action: *Bacon v.*

199; *West v. Hughes*, 2 Am. Dec. 539; *Apalachicola v. Apalachicola Land Co.*, 79 Id. 284, but he may also, by declaring specially, recover in addition to the rental of the premises such extra damages as the particular circumstances of the case may demand, including all immediate injuries resulting from acts done during the disseisin, such as the cutting of timber, or removal of crops: *Adams on Ejectment*, 391; *Pennington on Ejectment*, 439; *Goodtitle v. Tomba*, 3 Wils. 118; *Dewey v. Osborne*, 4 Cow. 329; *Drexell v. Man*, 2 Barr. 271; *Huston v. Wickersham*, 2 Watts & S. 308; *Masterson v. Hagan*, 17 B. Mon. 325; *Emrich v. Ireland*, 55 Miss. 390; *Rowland v. Rowland*, 8 Ohio, 41; *Lippett v. Kelley*, 46 Vt. 516; *Bacon v. Sheppard*, 20 Am. Dec. 583; *Cunningham v. Morris*, 65 Id. 611; *De Mott v. Hagerman*, 18 Id. 443; *Haley v. Wheeler*, 8 Hun, 569. An action of trespass *quare clausum* is not barred by a recovery of a judgment in ejectment and for mesne profits; and in this action the plaintiff may recover damages for injuries committed upon the premises by the disseisor while in possession: *Walker v. Hitchcock*, 19 Vt. 634; but see *Cunningham v. Morris*, 65 Am. Dec. 611. And the plaintiff may also have this action against the defendant in ejectment for an injury done intermediate the verdict and the execution of the writ of *habere facias possessionem*: *Dewey v. Osborn*, 4 Cow. 329. But even to maintain these actions, possession is necessary and the mere recovery of judgment in ejectment is not sufficient, but the plaintiff must first obtain possession of the premises: *Caldwell v. Walters*, 22 Pa. St. 378.

Upon affidavit that the complainant in a bill praying an injunction against a writ of possession in ejectment is committing waste, the court, at the instance of the defendant, will make an order in the cause staying the waste: *Howze v. Green*, Phill. Eq. 250. In New York it is provided by statute that after the commencement of any action for the recovery of land or for the recovery of the possession of any land, the defendant shall not make any waste of the land in demand pending the suit; and if such defendant shall commit waste, the court in which the suit is pending shall have power, on the application of the plaintiff, to make an order restraining the defendant from the commission of any further waste thereon. And under that statute it was held not to be waste for a defendant in ejectment to cut down timber trees for the purpose of clearing up the land: *People v. Davison*, 14 Barb. 109; see also *Rick v. Baker*, 3 Denio, 79; *Thomas v. Crofut*, 14 N. Y. 474.

Re-entry and Trespass Quare Clausum. — The owner may also re-enter upon the land; and under the doctrine of relation, maintain trespass against the adverse occupant for all loss and damages accruing since the ouster of the plaintiff. Before re-entry he has his action *quare clausum fregit* for the act of disseisin, for at that time he was in possession, and the disseisin was a trespass; but he recovers damages for the disseisin alone: *Stevens v. Hollister*, 46 Am. Dec. 154; *Smith v. Wunderlick*, 70 Ill. 426; *Smith v. Ingram*, 7 Ired. 175; *Gilchrist v. McLaughlin*, 7 Id. 310. But after re-entry, the owner, by a legal fiction called relation, is regarded as having been continuously invested with the freehold and possession, which, before the re-entry, was in the disseisor: *Cutting v. Cox*, 19 Vt. 521; *Dewey v. Osborn*, 4 Cow. 329; *Truber v. Miller*, 48 Conn. 347; S. C., 40 Am. Rep. 177; *Lifford's Case*, 11 Rep. 51. A disseisee may have trespass "against a disseisor for the disseisin itself, because he was then in possession; but not for an injury after disseisin, until he hath gained possession by re-entry; and then he may support this action for the intermediate damage; for after the entry, the law, by a kind of *jus post limini*, supposes the freehold to have all along continued in him": 1 Ch. Pl., 16th Am. ed., 196; Vin. Abr., tit. Trespass T;

11 Coke 51 a; 3 Eia. Com. 210; 2 Roll. Abr. 554; Bro. Abr., tit. Trespass, pl. 26; *Holcomb v. Rawlins*, Cro. Eliz. 540; Com. Dig., tit. Trespass, B 3; *Stevens v. Hollister*, 46 Am. Dec. 154. He may therefore, after such re-entry, have his action of trespass *quare clausum* against his disseisor, and laying it with a *continuando* may recover therein, besides rents and profits, all the intermediate damage to the premises done between the disseisin and re-entry, the disseisor being allowed credit for his improvements: *Holcomb v. Rawlins*, Cro. Eliz. 540; *Stean v. Anderson*, 4 Harr. (Del.) 209; *Smith v. Wunderlick*, 70 Ill. 426; *Hooser v. Hays*, 10 B. Mon. 72; *Chadbourn v. Straw*, 22 Id. 450; *Brown v. Ware*, 25 Me. 411; *Abbott v. Abbott*, 51 Id. 575; *Putney v. Dresser*, 2 Met. 583; *Tyler v. Smith*, 8 Id. 599; *Dorrell v. Johnson*, 17 Pick. 263; *Bigelow v. Jones*, 10 Id. 161; *Allen v. Thayer*, 17 Mass. 296; *Elmer v. Ireland*, 55 Miss. 390; *Fuhrer v. Langford*, 11 Mo. 286; *De Mott v. Hagerman*, 8 Cow. 220; S. C., 18 Am. Dec. 443; *Tobey v. Webster*, 3 Johns. 471; *Holmes v. Seely*, 19 Wend. 507; *Morgan v. Varick*, 8 Id. 591; *Bynum v. Carter*, 4 Ind. 310; *Smith v. Ingram*, 7 Id. 175; *Gilchrist v. McLaughlin*, 7 Id. 310; *Rowland v. Rowland*, 8 Ohio, 41; *Caldwell v. Walters*, 22 Pa. St. 380; *King v. Baker*, 25 Id. 186; *Cutting v. Cox*, 19 Vt. 521. And when, after his re-entry, he is again ousted by the disseisee, he may recover in the action, in addition to the damages for the first disseisin and intermediate losses and injuries, damages for the second disseisin; and if this latter is continued, then there must be a new entry on the part of the owner in order to recover for damages accruing subsequent to it: *Cutting v. Cox*, 19 Vt. 517-521; *Illinois etc. Coal Co. v. Cobb*, 82 Ill. 183; *Abbott v. Abbott*, 51 Me. 575. And thus an owner out of possession may have an action for injuries committed to the freehold by one in the adverse possession thereof at the time of suit, though the plaintiff must have had the possession at the time of the alleged injuries.

After re-entry, the owner having possession by relation may bring trover against a person who, with knowledge of the title to the property, cut and carried away timber while the owner was out of possession: *Heath v. Ross*, 12 Johns. 140. But it seems that replevin will not lie, even after re-entry, for fixtures or products of the freehold severed before the re-entry, but the owner is confined to his remedy of trespass *quare clausum*, or for meane profits: *De Mott v. Hagerman*, 18 Am. Dec. 443; *King v. Baker*, 25 Pa. St. 188; *Powell v. Smith*, 2 Watts, 123. But in an action of replevin by the disseisor against the owner, for an act done while he was out of possession, the defendant may show that he has re-entered, and vested the title in himself; and to this extent, title may be incidentally tried in the action: *Elliot v. Powell*, 36 Am. Dec. 200.

The statute of limitations may bar the plaintiff of his remedy for injuries to the freehold, as where the injury was done more than the statutory time of limitation before the recovery in ejectment or entry on the land, and the defendant pleads the statute: *Morgan v. Varick*, 8 Wend. 587.

WHEAT ENTRY BY OWNER WILL TERMINATE ADVERSE POSSESSION AND VEST SKIN IN HIM. — This subject is treated in the notes to *Peabody v. Hewett*, 83 Am. Dec. 497-500.

REMEDY OF DISSEISIN AGAINST STRANGER. — It is a rule of the common law that the doctrine of relation shall not take effect to the injury as a stranger. And the question arises whether, after regaining possession, the disseisee has any remedy for injuries to the freehold against any one else than the disseisor. Some of the authorities state that his only action is against the disseisor and his servants, and others who have committed the

trespass by his command, and in his right: *Keilway*, 1 b., Hob. 98; 1 Bac. Abr., tit. Trespass, G, 40; 1 Roll. Abr. 101; *Lifford's Case*, 12 Jac. 4; 8 C., 11 Rep. 51; *King v. Baker*, 25 Pa. St. 186; *Dewey v. Osborn*, 4 Cow. 329; and that he can have no action against a feoffee of the disseisor, because he comes in by title, and the doctrine of relation shall not make him who comes in lawfully, that is, by title, a wrong-doer: *Id.* On the other hand, there is weighty authority to the contrary, and to the effect that after re-entry the disseisee may have his action of trespass either against the disseisor, his lessee, donee, or feoffee, or against a stranger for mesne profits and trespass done during disseisin, on the ground, of course, that by relation the possession is regarded as having been continuous in the plaintiff since the disseisin: 2 Roll. Abr. 554; *Holcomb v. Rawlins*, Cro. Eliz. 540; *Truber v. Miller*, 48 Conn. 347; S. C., 40 Am. Rep. 177; *Morgan v. Varick*, 8 Wend. 587; *Green v. Biddle*, 8 Wheat. 75; see *Bacon v. Sheppard*, 20 Am. Dec. 584-586, where the early authorities are collected and reviewed.

But the action does not lie against a stranger who enters under a person who is lawfully in possession under process of law, such a person being, indeed, a stranger, as he has a right to rely upon the legality of process of law. Thus, in *Case v. De Goes*, 3 Caines, 361, the action was trespass for carrying away saw-logs. The defense was a license from one Bull, who was in possession by virtue of a writ of restitution, which, however, was afterwards quashed. Bull was in possession by the judgment of a court having jurisdiction of the subject-matter. The proceedings having been set aside for irregularity, Bull was considered a trespasser by relation, but not the defendants, who were strangers. And in *Bacon v. Sheppard*, 20 Am. Dec. 583, and *Merrill's Case*, 13 Rep. 21, the possession was taken under an erroneous judgment, and this being set aside, and the owner restored to possession, he had an action for mesne profits and intermediate damage, by whomsoever done, against the one who took possession under the judgment, but not against one who came in under title from the intermediate possessor.

"Strangers," then, against whom the doctrine of relation is not effectual, should be strangers who enter under a title upon which they are justified in relying. Persons who commit trespasses upon the premises while they are in the possession of a disseisor may be liable to him, but if he fails to sue, the owner may have his action against such trespasser after regaining from the disseisor his possession. The doctrine of relation regards the disseisee as having been in possession during the whole period of disseisin, and therefore after re-entry the law cannot regard the disseisor as having been in possession at all, since one or the other must have the possession. Therefore, after ouster the disseisor has no action against the trespasser during his possession, and consequently the true owner will have the remedy, there being no wrong without a remedy. It is true that the owner may recover for all the intermediate injuries to the land from the disseisor, except that he cannot recover from the disseisor for damage done by a third person without the consent or connivance of the disseisor: *Brown v. Ware*, 25 Me. 411. If he recovers from the disseisor for damage done by a third person, that will be satisfaction, and he cannot again recover from the third person. Such is the law in the case of co-trespassers: Note to *Kirkwood v. Miller*, 73 Am. Dec. 144 et seq. On the other hand, if he cannot recover from the disseisor for the intermediate injury done by a third person, without the disseisor's connivance, then *a fortiori* he has his action against such third person: See *Woods v. Banks*, 14 N. H. 101; see also *Heath v. Ross*, 12 Johns. 140; *Hawkins v. Roby*, 77 Mo. 140.

REPLEVIN OR TROVER LIES IN BEHALF OF OWNER OF FREEHOLD FOR PROPERTY WRONGFULLY SEVERED from the freehold: *Ogden v. Stock*, *post*, p. 332, and note; *Congregational Society v. Fleming*, 79 Am. Dec. 511; *Harlan v. Harlan*, 53 Id. 612; provided, of course, he is entitled to the immediate possession: *Alden v. Carver*, 81 Id. 430, and note 432; but it will not lie when the defendant is in possession under claim of title: *Snyder v. Paux*, 21 Id. 466; *De Mott v. Hagerman*, 18 Id. 443.

McCAGG v. HEACOCK.

[84 ILLINOIS, 476.]

CONVEYANCE OF MORTGAGED PREMISES BY MORTGAGOR TO MORTGAGEE IN SATISFACTION OF DEBT, is color of title; and if the grantee pays taxes on the land, while it is vacant, for more than seven years thereafter, this will constitute a good defense to a suit to redeem the premises by a person claiming by virtue of an execution sale and deed of the premises under a judgment rendered against the mortgagor before his conveyance to the mortgagee.

INSTRUMENT INDICATING INTENTION TO PASS FROM ONE PARTY TO ANOTHER TITLE TO LANDS of which a description is given, gives color of title to the lands described.

LAW PRESUMES THAT ALL ACTS ARE DONE IN GOOD FAITH, until there is evidence to the contrary.

COLOR OF TITLE IS PRESUMED TO HAVE BEEN ACQUIRED IN GOOD FAITH, till it is shown to have been acquired otherwise.

GOOD FAITH, REQUIRED BY STATUTE, IN CREATION OR ACQUISITION OF COLOR OF TITLE, is a freedom from a design to defraud the person having the better title.

KNOWLEDGE OF ADVERSE CLAIM TO OR LIEN UPON PROPERTY does not, of itself, indicate bad faith in a purchaser, and is not evidence of it, unless accompanied by some improper means to defeat such claim or lien.

LEGAL PRESUMPTIONS ARE RULES ESTABLISHED BY COMMON LAW OR STATUTE, and are founded upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things.

WHERE ONE FACT IS PROVED OR ASCERTAINED, another, its uniform concomitant, is universally and safely presumed; and it is this uniformly experienced connection which leads to its recognition by law, without other proof. Many of these presumptions are conclusive because they have been found to be so general and uniform as to render it expedient, from motives of public policy, for the sake of greater certainty and the promotion of the quiet and peace of the community, that this connection of fact should be taken to be inseparable and universal.

LEGISLATURE HAS POWER TO EXTEND CONCLUSIONS OF LAW ARISING FROM ADVERSE POSSESSION to such cases and to such circumstances as it may deem best for the public good.

PAYMENT OF TAXES FOR SEVEN SUCCESSIVE YEARS, UNDER CLAIM AND COLOR OF TITLE, made in good faith, and after possession taken under such color of title, creates a legal conclusion, by virtue of the statute, that the possessor was the true owner to the extent and according to the purport of his paper title.

BILL in chancery by the defendants in error, to redeem certain land from the plaintiffs in error, who claimed it under a mortgage and conveyance from the mortgagor to the mortgagee, the complainants claiming under a judgment against the mortgagor rendered after the mortgage but before the conveyance. The opinion states the case.

W. C. Goudy, for the plaintiffs in error.

A. Garrison, for the defendants in error.

By Court, BECKWITH, J. This is a suit in equity by the widow and heirs at law of Reuben B. Heacock, to redeem seventeen lots of land in block 129, in school section addition to Chicago, from a mortgage dated October 25, 1836, executed by Russell E. Heacock and wife to Henry Van Antwerp. In the year 1838, a suit by *scire facias* was commenced to foreclose the mortgage, in which a judgment was rendered on the 16th of May, 1839, directing a sale of seventeen of the lots mentioned in the mortgage; and it was released as to the remaining three lots. On the first day of July, 1840, Russell E. Heacock and wife conveyed the seventeen lots to Van Antwerp, in satisfaction of the debt. The premises remained vacant and unoccupied from 1840 until January 13, 1853, when Van Antwerp sold the same to McCagg, one of the plaintiffs in error, during which time Van Antwerp paid all the taxes thereon. McCagg entered into possession soon after his purchase, and was in possession when the suit was commenced on the 11th of February, 1854. On the 5th of July, 1837, James Kinzie et al., recovered a judgment in the municipal court of Chicago against Russell E. Heacock for \$165.43, and under a *pluries fi. fa.*, which was issued thereon and dated January 13, 1841, all the right, title, and interest of the defendant therein was, on the 24th of February, 1841, sold to Reuben B. Heacock. There was no redemption from the sale, and on the 13th of June, 1842, the sheriff executed a deed to the purchaser. Russell E. Heacock died in 1849, intestate, and Reuben B. Heacock died in 1854, intestate, leaving the appellees (excepting Elizabeth Heacock, his widow) his heirs at law, who were also heirs at law of Russell E. Heacock. Pending the suit, McCagg filed a cross-bill, praying that the appellees might be decreed to release to him all claim which they might have to the premises. We think it is unnecessary to discuss many of the questions raised in argument. The deed of Russell E. Heacock to Van Antwerp, dated July 1, 1840,

was color of title. Any instrument indicating an intention to pass a title to lands, of which a description is given, from one party to another, gives color of title to the lands described.

For some reason such an instrument often fails to effect that intention, and passes only the color, or semblance of a title. It makes no difference whether the instrument fails to pass a title because the grantor had none to convey, or had no authority in law or in fact to convey one. Inasmuch as the instrument fails to pass an absolute title, for the reason that the grantor was not possessed of one or more necessary requisites, it gives the semblance or color only of what its effect would be if they were not wanting. For more than seven years from the time when Van Antwerp acquired his color of title, the premises were vacant and unoccupied; and during all that time he paid all taxes assessed thereon. The law presumes that all acts are done in good faith until there is evidence to the contrary; and color of title is presumed to have been thus acquired, till it is shown to have been acquired otherwise. The good faith required by the statute in the creation or acquisition of color of title is a freedom from a design to defraud the person having the better title.

The lands in controversy were conveyed to pay a just debt, and there was not even a suggestion of any fraud. The appellees do not seek to redeem as the heirs at law of Russell E. Heacock; and under the allegations of their bill they are not at liberty to insist that undue advantage was taken of his necessitous condition. They seek to redeem as the heirs at law of Reuben B. Heacock, under a title anterior in its origin to the deed to Van Antwerp; and as heirs of Reuben B. Heacock, claiming under a title adverse to that of Russell E. Heacock, they have no right to inquire into the circumstances under which his deed to Van Antwerp was made.

But, after careful examination of the record, we are unable to discover circumstances which would entitle the appellees to relief as heirs of Russell E. Heacock. Three of the lots mortgaged were voluntarily released, and his indebtedness was canceled for the residue of them, and there is no evidence of any oppression, or undue advantage taken of him.

It was insisted in argument that Van Antwerp had notice of the judgment lien of Kinzie et al. upon the equity of redemption. The taking of a conveyance from Heacock with such notice was not a fraud upon Kinzie et al. It impaired none of their rights. The knowledge of an adverse claim to

or lien upon property does not, of itself, indicate bad faith in a purchaser, and is not even evidence of it, unless accompanied by some improper means to defeat such claim or lien. When this suit was commenced, the grantee of Van Antwerp was in possession of the premises, and his grantor having had color of title, made in good faith, for more than seven years, and having (during that time) paid the taxes, the appellant, McCagg, acquired a complete bar.

The act of March 2, 1839, which was subsequently incorporated into the revised statutes of 1845, did not introduce a new mode of acquiring title, but applied to circumstances peculiar to an unsettled country, a mode of confirming titles as old as the common law itself.

Legal presumptions are rules established by the common law or by statute, and are founded upon the first principles of justice or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things.

Where one fact is proved or ascertained, another, its uniform concomitant, is universally and safely presumed; it is this uniformly experienced connection which leads to its recognition by law, without other proof. Many of these presumptions are conclusive, because they have been found to be so general and uniform as to render it expedient for the common good that this connection should be taken to be inseparable and universal. They have been adopted by common consent from motives of public policy, for the sake of greater certainty and the promotion of the quiet and peace of community, and therefore all opposing evidence is forbidden.

In some cases, this common consent is declared through the medium of judicial tribunals as a part of the common law. Before the passage of the statute of Westminster, 1 (3 Edw. I., c. 39), the titles to lands and other rights were presumed from possession, or a *quasi* possession, from the time whereof the memory of man runneth not to the contrary. By that act the period of legal memory was established to be the first day of the reign of Richard I. (July 6, 1189), and titles to lands and incorporeal rights were established by legal conclusions drawn from circumstances existing during the period of time thus limited.

The statute 32 Hen. VIII. barred the writ of right after sixty years, and by a legal conclusion, drawn by the courts, the true owner was divested of his right of property, and the

same was vested in the disseisor: 3 Bla. Com. 196. So the statute 21 James I. barred the right of entry after an adverse possession of twenty years, and by a like conclusion the right of possession was vested in the disseisor. In each case, the statute fixed the circumstances under which an action should not be sustained, and the legal conclusion therefrom was drawn by courts. The circumstances designated were such as the legislature thought proper to name, but other circumstances might have been named, as, for example, the payment of taxes or the rendition of knight-service; or the time might have been more limited if the legislature had thought proper. It is undoubtedly within the power of the legislature to extend such conclusions of law to such cases and to such circumstances as it may deem best for the public good.

In this country the taxes upon land are usually paid by the true owner; and after payment of the same for seven successive years under claim and color of title made in good faith, and after actual possession taken under such color of title, the presumption of ownership is so strong that the legislature for the promotion of quiet and the peace of community, in its wisdom declared it to be a legal conclusion from such circumstances that the possessor was the true owner to the extent and according to the purport of his paper title.

The conclusion thus declared we are required to administer as a part of the law of the land.

The decree of the court below will be reversed, and a decree entered in this court dismissing the original bill, and granting the prayer of the cross-bill.

Decree reversed.

FRAUD IS NEVER PRESUMED: *McCarthy v. White*, 82 Am. Dec. 754, and note; *Hempstead v. Johnston*, 65 Id. 458, and note 474. See also the note to *Burch v. Smith*, 65 Id. 157 et seq. The principal case is cited to the point that the law presumes that all acts are done in good faith unless the contrary is shown and a deed imports good faith, unless fraud is proved or unless facts and circumstances attendant upon its execution show that the party accepting it had no confidence in it and took it with a design to defraud the holder of the better title: *Hardin v. Orate*, 60 Ill. 221; *Lake Shore etc. R'y Co. v. Pittsburg etc. R'y Co.*, 71 Id. 40.

LEGAL PRESUMPTIONS MUST BE BASED ON FACTS AND NOT UPON PRESUMPTIONS: *Pennington v. Yell*, 52 Am. Dec. 262; and the facts from which the presumptions arise must be clearly proved: *Danley v. Rector*, 50 Id. 242.

COLOR OF TITLE, WHAT CONSTITUTES: See *City of St. Louis v. Gorman*, 77 Am. Dec. 586, and note 592; *Edgerton v. Bird*, 70 Id. 473, and note 478. A deed or instrument relied upon as color of title must purport on its face to transfer or convey title: *Hassett v. Ridgley*, 49 Ill. 202. Thus a deed of com-

veyance, which purports to convey title executed by a purchaser at a sale under a judgment of foreclosure of a mortgage upon the premises will constitute color of title in the grantee, notwithstanding the judgment of foreclosure be void: *Hinkley v. Greene*, 52 Id. 232; and where a purchaser under a decree foreclosing a senior mortgage, although a junior mortgagee is not made a party to the foreclosure proceedings, acquires by his deed color of title in good faith; and possession of the premises and payment of taxes thereon for seven years under the deed, constitutes a bar to the foreclosure of the junior mortgage: *Mason v. Ayers*, 73 Id. 124. So where a party had conveyed land to another in trust for the benefit of a portion of the creditors of a railroad company, it was held that a sheriff's deed to the grantor for the same land, based on a sale under an execution issued on a judgment against the railroad company, as also a tax deed to the same party, were color of title, under the limitation law: *Thomas v. Eckard*, 88 Id. 595. The principal case is cited to the foregoing propositions.

GOOD FAITH REQUIRED BY STATUTE IN CREATION OR ACQUISITION OF COLOR OF TITLE is freedom from a design to defraud the person having the better title: *Smith v. Ferguson*, 91 Ill. 311, citing the principal case. And it is also cited to the point that bad faith, as contradistinguished from good faith in the limitation act, is not established by showing actual notice of existing claims or liens of other persons to the property, or by showing a knowledge, on the part of the holder of the color of title, of legal defects which prevent the color of title from being an absolute one: *Russell v. Mandell*, 73 Id. 138; *Coleman v. Billings*, 89 Id. 191. See, in this connection, *Pearson v. Burditt*, 80 Am. Dec. 649; *Royall v. Lessee of Lisle*, 60 Id. 712.

PAYMENT OF TAXES ON PROPERTY FOR REQUISITE PERIOD under color of title, while the land is vacant and unoccupied, which is followed by possession before suit brought, will create a bar under the Illinois statute: *Hinkley v. Greene*, 52 Ill. 234, citing the principal case. Payment of taxes by a claimant of land is a fact to be weighed by the jury in determining the question of adverse possession, although it is not in itself evidence of an ouster of the true owner: *Draper v. Shoot*, 69 Am. Dec. 462.

THE PRINCIPAL CASE came again before this court, and is reported in 48 Ill. 153, and the court there affirms the doctrines of the principal case, with the exception that the rule is laid down that the statute of limitations does not confer title, but is to be used merely as a shield, and the language of the principal case declaring it to be a legal conclusion, under the statute, that the possessor, who has conformed with its conditions, is the true owner, is modified so far as it conflicts with the above rule: See *Webber v. Chapman*, 60 Am. Dec. 111, and note 118; *Ford v. Wilson*, 72 Id. 137, and note 142.

OGDEN v. STOCK.

[84 ILLINOIS, 522.]

VENDOR IN POSSESSION HAS NO RIGHT TO ERECT HOUSE UPON PREMISES as property separate and distinct from the freehold, and an intention to do so, no matter how clearly manifested, is of no avail.

VENDOR MAY MAINTAIN REPLEVIN FOR HOUSE ERECTED UPON PREMISES BY VENDOR IN POSSESSION under unexecuted contract of sale, and sold by him to another, who removes it from the land, so long as it can be identified, and is not permanently annexed to other realty.

REPLEVIN. The opinion states the case.

Scammon, McCagg, and Fuller, for the appellant.

William Hopkins, for the appellee.

By Court, BECKWITH, J. This is an action of replevin, brought by the appellant, for a dwelling-house, alleged to have been wrongfully removed from a lot belonging to him, by the appellee. The pleas are *non detinet* and property in the appellee. On the trial, it was admitted that the appellant, in 1856, and from that time to the commencement of the suit, had been the owner in fee of the lot from which the building was removed; and it appeared in evidence that while he was the owner of the lot, in 1856, he made a contract with one Schuster to sell him the same for \$525, of which twenty-five dollars was paid in cash, and the residue was to be paid in five annual installments, the last of which fell due September 1, 1861. Four of the installments had become due, but only one of them had been paid. The contract provided that if the vendee should make default in any of the payments, the vendor should have the right to consider the agreement terminated, and to treat Schuster, his representatives or assigns, as tenants at will at a specified rent.

In 1858, while Schuster was in possession of the lot under the contract, he and the appellee erected thereon a dwelling-house, under an agreement that each was to own one half of the same. The house was placed upon blocks resting on boards, lying on the ground. For about two years after the house was finished, Schuster occupied it with his family, and in January, 1861, sold his share to the appellee, to whom he gave permission to occupy the lot until September, 1861. The house remained on the lot until June, 1861, when it was removed by the appellee. The appellant demanded possession of the house, and upon the refusal of the appellee to surrender the same, commenced this suit for its recovery. Upon the trial in the court below, the jury were instructed that the appellant was not entitled to recover. The general rule of the common law is, that things affixed to the realty become part of it, and belong to the owner thereof; but erections, which, from their general nature and character, are ordinarily deemed a part of the freehold, may be made in such manner, or under such circumstances, as render them distinct and separate property. In order to do this, the person making the improvement must have the right to determine whether

or not the erection shall become a part of the realty; and it must appear that it was not intended to form a part thereof.

The intention may be inferred, in some cases, from the manner in which the improvement is attached to the realty; and in others, from the nature of the title of the party making it, or from the purpose with which it was made; but if the party making the improvement, as between himself and the owner of the soil, has no right to erect the same, as property separate and distinct from the freehold, an intention so to do, no matter how clearly manifested, is of no avail. Schuster, at the time the dwelling-house was erected, was the vendee of the appellant, in possession of the premises under an unexecuted contract requiring him to pay for the land and make it his own. He was in default for a part of the payments already matured, owing a greater portion of the purchase-money, and paying no rent for his occupation of the premises. His enjoyment of the property was solely by reason of his agreement to pay for the same; and the law will presume that he intended to perform his agreement in good faith. It may well be presumed that the vendor, relying upon the agreement, and the additional security of the improvements for its performance, allowed Schuster to remain in possession after default in making his payments, and while in the enjoyment of the property under such circumstances, he could not, honestly, assert that he did not intend to perform his contract, and that he intended the erections on the lot as property separate from the freehold.

The law will not infer a dishonest intention, nor give effect to one when proven. The mode adopted in the construction of the foundation of the house would not, under the circumstances, show an intention on the part of the vendee to erect and maintain the same as property separate and apart from the realty. Having no right to claim that the improvements bore that relation to the freehold, he cannot be presumed to have made them with that intention. His position in regard to improvements was analogous to that of a mortgagor, who has no right to remove improvements he has put upon the land, permanent in their nature, for the reason that the law presumes that they were annexed with the design of being permanent: *Dooley v. Crist*, 25 Ill. 551. No intention at variance with this presumption is allowed to affect the rights of a mortgagee, or of a vendor, where the vendee is in possession under an obligation to make the land his own: *Smith v. Moore*, 26 Id. 892. The appellee, at the time the house was built, was

bound to take notice of the relation subsisting between the appellant and Schuster; and the evidence tends to show that he had actual knowledge thereof; what Schuster could not do, he could not authorize or permit another, either along with himself, or separately, to do; and therefore it is not perceived how the appellee, by joining with Schuster in erecting the building, under an agreement to become part owner of it, and afterwards obtaining a conveyance of Schuster's interest therein, acquired any right to remove it from the premises.

The dwelling-house, prior to its removal, was a part of the realty, and the legal title to the same was in the appellant. So long as the contract for the purchase of the land remained unexecuted, Schuster had only an equitable right to the house as a part of the realty, and the appellee acquired no greater right to it. They had no right of possession independent of their right to occupy the land, and when the house was removed from the realty their right of possession ceased. The severance and removal of the house were tortious acts, by which it was separated from the property which Schuster had a right to occupy, but did not change the legal title vested in the appellant as the owner of the freehold. The appellant's legal title drew to it the right of possession from the time Schuster's right of possession ceased. The appellant might have maintained trespass or trover for the value of the house; therefore, the action of replevin was sustainable, so long as the house could be identified, and was not permanently annexed to other realty: *Davis v. Easley*, 13 Ill. 192.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

STRICT RULE RESPECTING FIXTURES OBTAINS BETWEEN HIRE AND REPLEVIN, vendor and vendee, and mortgagor and mortgagee: *Montague v. Dent*, 67 Am. Dec. 572, and note 575. Though in *Taylor v. Townsend*, 5 Id. 107, it is held that a mortgagee, after recovery in equity by the mortgagor to redeem, and before possession taken under the judgment, may lawfully take down and carry away any buildings erected by him on the land mortgaged, the materials of which were his own, and not so connected with the soil that they cannot be removed without prejudice to it. But a building may be a chattel when such is the agreement of the parties: *Dame v. Dame*, 75 Id. 196, and see the cases cited in the note thereto 200. See also *Rogers v. Gilling*, 72 Id. 694, and note 697. Replevin or trover will lie for the recovery of property tortiously severed from realty, which, but for such severance, would be real property: *Congregational Society v. Fleming*, 79 Id. 511; *Harlan v. Harlan*, 53 Id. 612. The principal case is cited to the point that a house built upon a lot in pursuance of the requirement of a prior contract of pur-

chase of the lot thereby becomes part of the realty: *Hogsett v. Ellis*, 17 Mich. 375. A house may be so erected as to be strictly personal property, or the defendant may be estopped by his own acts from denying it to be so, as where, for example, he has improperly removed it from the land of the plaintiff, or where he has given a chattel mortgage on it as personal property: *Davis v. Taylor*, 41 Ill. 407. So one who enters land under an adverse title, and erects a house thereon, has no right to remove the house; and if he does so after being evicted, it becomes, after such severance, and while in the possession of the trespasser, personal property, and the land-owner may maintain replevin therefor: *Huebschmann v. McHenry*, 29 Wis. 663. In *Salter v. Sample*, 71 Ill. 432, however, the owner of a lot sold it by parol contract on a credit of one year, and the purchaser erected a frame house thereon, placed upon pillars, as a residence, and before the expiration of the year sold the house to another, who removed it to another lot, and there placed it upon brick pillars sunk in the ground, and built an addition to it; and it was held that the house was a part of the realty on the first lot, and that when it was removed and became fixed upon brick pillars on the other lot, it became a part of that lot, and replevin would not lie for it, though during its transit it might be regarded as personal property; and the principal case is distinguished on the ground that it was not there shown that the building was fixed permanently to the soil after its removal, and on the ground of the contractual relation existing between the vendor and vendee.

STRONG v. KING.

[35 ILLINOIS, 1.]

HOLDER OF SIGHT DRAFT MUST PUT IT INTO CIRCULATION, OR PRESENT IT FOR PAYMENT, at the farthest, on the next business day after its reception, if within reach of the person upon whom it is drawn, in order to charge the drawer and indorsers.

SIGHT DRAFT MATURES WHEN PRESENTED FOR PAYMENT, and if presented on the day of its reception, and not then paid, it must be protested for non-payment on the same day, and due notice given, in order to charge the drawer and indorsers, precisely as if it had been made payable on a specified day.

SIGHT DRAFT, LIKE ALL OTHER BILLS, SHOULD BE PRESENTED FOR PAYMENT BY HOLDER, or his agent, during the business hours of the day; but after such presentation, it may be again presented by a notary, for the purpose of making a protest for non-payment, after business hours, on the same day.

IF HOLDER OF SIGHT DRAFT, ON PRESENTING IT, FINDS NO ONE AT DRAWER'S PLACE of business to honor it, he may elect to consider the bill as not presented for payment; but any act evincing an election to consider it as presented for the purpose will bind the holder, and he cannot, after such election, claim that the bill was not presented for payment.

BARE RECEPTION OF CHECK FROM DRAWER FOR AMOUNT OF BILL will not, ordinarily, be considered as a payment, but only as a means of payment; and this is so, whether the bill is surrendered to the drawee at the time of receiving the check, or is retained by the holder until payment is commuted.

ACCEPTANCE OF CHECK FROM DRAWER OF BILL may be shown to have been in absolute payment.

APPROPRIATION OF CHECK BY HOLDER TO OWN USE, by putting it in circulation, becomes a payment of the bill for which it was received.

WHETHER CHECK WAS DEPOSITED WITH BANKER AS MONEY OR FOR COLLECTION, is a question of fact. If deposited in the usual course of business, the presumption is, that it was for collection merely, and not as money.

CHECK DEPOSITED AS MONEY OPERATES AS PAYMENT of the bill for which it was given from the moment the deposit is made.

HOLDER OF CHECK MAY AS WELL EMPLOY HIS BANKER, AS AGENT, to collect it as any other person; and if the holder deposits the check with his banker for collection, such deposit is the same, in legal effect, as handing the check to a messenger for the same purpose.

DEPOSIT OF CHECK FOR COLLECTION DOES NOT OPERATE AS PAYMENT OF BILL for which the check was given.

HOLDER OF CHECK OUGHT TO PRESENT IT FOR PAYMENT before the expiration of the next business day after it is received, in order to avoid loss by the failure of the drawee.

TIME WITHIN WHICH CHECK MUST BE PRESENTED TO CHARGE DRAWER in no wise regulates or fixes the time when a protest must be made in order to charge the drawer or indorser of a bill for which the check was received as a means of payment.

PARTY RECEIVING CHECK AS MEANS OF PAYMENT MUST PROCURE ITS PAYMENT on the day of its reception, or return it for non-payment on that day, so as to have the bill for which it was received protested for non-payment on that day.

CONSEQUENCES OF NEGLIGENCE TO PROTEST BILL MAY BE WAIVED by person entitled to take advantage of it; and a promise to pay the bill, made by the person insisting upon the want of protest, after he is aware of the laches, to the holder, amounts to a waiver of such laches, and admits the holder's right of action.

USAGE IN PARTICULAR PLACE, HOWEVER LONG OR WELL ESTABLISHED, that checks may be received as a means of payment for a bill, and the bill be held over until the next day without protest, for the purpose of ascertaining whether the check will be paid, cannot be allowed to alter the general commercial usage of the world.

APPEAL from the superior court of Chicago. *Assumpsit* to recover upon a bill of exchange. The opinion states the case.

Arrington and Dent, for the appellants.

Waite and Towne, for the appellee.

By Court, WALKER, C. J. This was a sight draft drawn by Strong and Wiley Brothers on the Ohio Life Insurance and Trust Company, in favor of Williams and Brother. The last-named firm indorsed the draft to R. K. Swift, Brother, and Johnston, who indorsed the same to appellee. It was negotiated on the day of its date to R. K. Swift, Brother, and Johnston, who, on the same day, sent it to Swift, Ransom, & Co., of New

York, for collection; and it reached them on Saturday, August 22, 1857. On that day Swift, Ransom, & Co., indorsed upon the draft "received payment," and wrote their name under the indorsement, and sent it by messenger to the trust company for payment. He received a check for the amount, drawn upon the American Exchange Bank, and left the draft in the possession of the company. This check was placed in the bank with which Swift, Ransom, & Co., transacted their business, to go through the clearing-house. On the next Monday the check was thrown out, at the clearing-house, and on that day the trust company had suspended and did not open for business.

The check was on that day returned, but the assets and papers of the trust company were then in the hands of the sheriff, who, notwithstanding the trust company were willing to return the draft, was unwilling to surrender it to Swift, Ransom, & Co. Payment of the draft was demanded and refused, and the draft was then protested, and notice by mail was given to Strong and Wiley Brothers. On the same day Swift, Ransom, & Co., telegraphed to Swift, Brother, and Johnston that the trust company had failed, and that the draft was unpaid. It is likewise insisted that after notice of protest appellants agreed to pay and take up the draft.

The first question presented is, whether the protest for non-payment was in time so as to hold the drawer and indorsers. It may safely be stated as a rule that the holder of a sight bill, in order to charge the drawer and indorser, must put it into circulation or present it for payment, at the farthest, on the next business day after its reception, if within reach of the person upon whom it is drawn: Chitty on Bills, 382. Such an instrument matures when presented for payment; and if presented on the day of its reception it is thereby matured, and if not then paid it must be protested for non-payment on the same day, and due notice given in order to charge the drawer and indorsers precisely as if it had been made payable on a specified day. And such a bill, like all others, should be presented for payment by the holder or his agent during the business hours of the day. And after a bill has been presented by the holder or his agent for payment, it may be again presented by a notary public, for the purpose of making a protest for non-payment, after business hours on the same day: Chitty on Bills, 458.

But if the holder of a sight bill presents it, and finds no one

at the drawee's place of business to honor it, he may elect to consider the bill as not presented for payment, but any act evincing an election to consider it as presented for the purpose will bind the holder, and he cannot, after such election, claim that the bill was not presented for payment: *Mitchell v. Degraud*, 1 Mason, 176.

The bare reception of a check from the drawee for the amount of the bill will not ordinarily be considered as a payment, but only as a means of payment; and this is the rule, whether the bill is surrendered to the drawee at the time of receiving the check, or is retained by the holder until payment is consummated. It may be imprudent to surrender the bill before actual payment is made, but such improvidence does not change the rule.

Although the bare reception of a check will not, usually, be considered as a payment, but simply as a means of obtaining payment, still it may be shown that the check was, in fact, received as absolute payment. The fact may be established by showing an express agreement to that effect, or by showing such circumstances as will satisfy the mind that such was the understanding of the parties at the time the check was taken. If the holder of the check appropriates it to his own use by putting it into circulation, it then becomes a payment of the bill for which it was received. Or when the holder of a check received for the amount of a bill deposits it with his banker, it becomes a question of fact whether such deposit was made as and for so much money to the credit of the depositor, or whether the check was deposited for collection merely. If deposited in the usual course of business, the presumption would be that it was for collection merely, and not as money. By the usage of bankers, the teller, with whom such deposits are generally made, has no authority to receive them as and for money, and this is known to the depositor; but the teller has authority to receive checks for collection, and therefore the presumption is, that they were received for that purpose until the contrary is shown.

If, however, a banker receives a check as and for so much money, and gives the depositor credit therefor, such an act is an appropriation of the check by the holder, and operates as a payment of the bill for which it was received from the moment the deposit was made. And from that time the check becomes the absolute property of the banker with whom it is deposited, and the bill ceases to exist, and cannot be revived, except by

the agreement of all the parties who would be affected thereby. But the holder of a check may as well employ his banker as an agent to collect it as any other person. And if the holder deposits the check with his banker for collection, such deposit is precisely the same in its legal effect as handing the check to a messenger for the same purpose. Such a deposit will not operate as a payment of a bill for which a check was taken. In such a case, if the check is duly presented and not paid, the depositor must receive it back from the messenger or banker acting as such. In order to avoid loss by the failure of the drawer, the holder of a check ought to present it for payment before expiration of the next business day after it is received. But the time within which a check must be presented to charge the drawer in no wise regulates or fixes the time when a protest must be made, in order to charge the drawers or indorsers of a bill for which the check was received as a means of payment.

If a check is received as a means of payment, the party receiving it must procure its payment on the day of its reception, or return it for non-payment on that day, so as to have the bill for which it was received protested for non-payment on that day. The person receiving a check for such a purpose has no more right to send it through a banker for collection on the next business day, than he has to put it in his safe and send it by his clerk on the next business day. Whilst a presentment on the next business day is sufficient to charge the drawer of the check, it is no excuse for the non-protest of the bill on the day of its presentation for payment. The negligence of the holder of the check in not procuring payment of the bill on the day of its presentation, by the means he receives for that purpose or otherwise, discharges the drawers and indorsers of the bill, if protest is not made.

The consequences of a neglect to protest may be waived by the person entitled to take advantage of it, and a promise to pay the bill, made by the person insisting upon the want of protest, after he is aware of the laches, to the holder, amounts to a waiver of such laches, and admits the holder's right of action: *Chitty on Bills*, 501.

When tested by these rules, it will be seen that there have not been proper steps to charge the drawer and indorsers in this case. The bill was received for collection by Swift, Ransom, & Co., on the twenty-second day of August, and notwithstanding they might have delayed presenting it for payment

until the 24th, which being Monday was the next business day, they saw proper to present it for payment on the same day it was received. By so presenting it, the bill became due on that day, and to have held the drawer and indorsers, precisely the same steps should have been taken as if the bill had, in terms, been payable on that day. And for that purpose it was necessary to have had it protested, and due notice given to the drawers and indorsers of the bill. Had it been specifically payable on the 22d, it would not be contended that a protest and notice of non-payment on the 24th would have been in time; and yet there is no difference in principle in the two cases.

The evidence of usage is not sufficient to establish a general custom that checks may be received as a means of payment for a bill, and the bill be held over until the next day without protest, for the purpose of ascertaining whether the check will be paid. It can hardly be supposed that such a usage could alter the general commercial usage of the world, however long or well established. If such a custom did obtain in New York, it could not affect the law of other places.

We have not deemed it necessary to consider the effect of an agreement, express or implied, on the part of Strong and Wiley, with the Ohio Life Trust Company, that drafts drawn upon funds deposited with it should be paid through the clearing-house, according to a usage of paying them in that manner. It will be time to consider that question when such an agreement is shown, and it shall also be shown that Strong and Wiley must have known, in drawing the draft, that such agreement would be acted upon by the New York correspondent of Williams and Brother, and that it was so acted upon.

The instructions contravened these rules, and were therefore erroneous.

It was contended that the appellants, after notice of the protest, agreed to pay and take up the draft. If such a promise was made, in view of all the facts attending the presentation of the draft for payment and its subsequent protest, there can be no question that their liability was revived. But if such a promise was made in ignorance of any material fact, it would be otherwise. And it is for the jury, in view of all the evidence in the case, to say whether such a promise was made. And as the case will be passed upon by another jury, it would not be proper to pass upon the evidence in this record bearing upon that question.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

ACCEPTANCE, NATURE OF AGREEMENT: *Swope v. Ross*, 30 Am. Dec. 567; *McKleroy v. Southern Bank*, 74 Id. 438.

PRESENTMENT, AND WHAT EXCUSES: *Adams v. Darby*, 75 Am. Dec. 115; *Edgar v. Greer*, 74 Id. 316; *Terbell v. Downer*, 65 Id. 212. Presentment is mixed question of law and fact: *Prescott v. Caverly*, 66 Id. 473. Presentment for payment at time and place specified is unnecessary to charge acceptor: *Terbell v. Downer*, *supra*.

ACCEPTANCE OF CHECK: *Morrison v. Bailey*, 64 Am. Dec. 632, and note 634; *Barnet v. Smith*, 64 Id. 290.

DUTY OF BANK TO PAY OUT FUNDS OF DEPOSITOR ON HIS CHECK: *Fogarties v. State Bank*, 78 Am. Dec. 468, and note 475; *Chicago etc. Ins. Co. v. Stanford*, 81 Id. 270.

CHECKS AS PAYMENT: *Barnet v. Smith*, 64 Am. Dec. 290, and note 296; *Masser v. Bowen*, 72 Id. 619.

PRESENTMENT OF CHECK: *Smith v. Jones*, 32 Am. Dec. 527; *Barber v. Bayon*, 52 Id. 593, and note 594; *Taylor v. Wilson*, 45 Id. 180.

PARTICULAR USAGES DO NOT AMOUNT TO RULE OF ACTION: *Barlow v. Lambert*, 65 Am. Dec. 374, and note 379; *Marine Bank v. Chandler*, 81 Id. 249, and note 253.

THE PRINCIPAL CASE IS CITED to the first point stated in the *syllabus*, in *Montelius v. Charles*, 76 Ill. 306; and to the second point stated in the *syllabus*, in *Skellon v. Dustin*, 92 Id. 53. It is cited as being in harmony with the doctrine that if a subsequent note was executed and accepted by the respective parties in satisfaction of a former one, the satisfaction is complete, in *Fates v. Valentine*, 71 Id. 644.

CITY OF JOLIET v. VERLEY.

[85 ILLINOIS, 58.]

CITIES ARE UNDER POLITICAL OBLIGATION TO OPEN SUCH STREETS as the convenience of the community requires, but courts cannot compel the performance of such a duty, or hold them responsible for its non-performance.

LEGAL OBLIGATION OF CITY TO REPAIR HIGHWAYS, SIDEWALKS, AND BRIDGES WITHIN CORPORATE LIMITS, is one voluntarily assumed by its corporate authorities, and relates to such as are opened or constructed under its authority, and those which its officers assume control over for that purpose.

CITY IS UNDER NO OBLIGATION TO MAKE APPROACHES OR PASSAGE-WAYS to a bridge erected by the canal trustees within the city limits; but when the city in the exercise of its authority undertakes to make the passage-ways to a bridge erected under such circumstances, it must do so in a way not to endanger the lives or limbs of its inhabitants.

CITY IS GROSSLY DELINQUENT IN ITS DUTY in constructing a passage-way on the border of an embankment without sufficient guards for the protection of travelers.

RULE AS TO LIABILITY OF MUNICIPAL CORPORATION IN RESPECT TO HIGHWAY is, that "where the loss is the combined result of an accident, and of a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet if there be no fault or negligence of the plaintiff, if the accident be one which common prudence and sagacity could not have foreseen and provided against, the corporation is liable."

WRIT of error to the circuit court of Du Page County. **Action** to recover damages for injuries received by the plaintiff in falling from a sidewalk down an embankment, in the city of Joliet, it being alleged that the accident was occasioned by the insecure condition of the sidewalk, which it was the duty of the city authorities to keep in repair. The jury returned a verdict for the plaintiff, and the defendant sued out writ of error. The opinion states the material facts.

By Court, BECKWITH, J. The canal trustees built a bridge across the Illinois and Michigan canal, within the corporate limits of the city of Joliet, over which all persons were allowed to pass and repass at pleasure. In determining the liability of the appellant in the case under consideration, it is unnecessary to consider its authority respecting the bridge, or its obligation to keep it in repair. The canal trustees could not, by building a bridge, impose upon the city the burden of keeping it in repair. The legal obligation of a city to repair highways, streets, sidewalks, and bridges within its corporate limits is one voluntarily assumed by its corporate authorities, and relates to such as are opened, or constructed, or allowed to be opened, or constructed, under its authority, and those which its officers assume control over for that purpose. Until the city assumes control over a bridge erected without its assent or authority, it is not liable for its not being kept in repair. Nor do we deem it necessary to consider the authority of the city over the abutments and approaches to the bridge, with reference to an infringement of the rights of the canal trustees. The city was under no obligation to make approaches to the bridge for the convenience of its citizens. Its obligation in this respect was the same as those in relation to opening new streets and building market-houses. Cities are under a political obligation to open such streets and build such market-houses as the convenience of the community requires; but courts cannot compel the performance of such duties, or hold them responsible for their non-performance. The canal trustees have never objected that the city made such approaches to the bridge as it

thought proper; and so long as they did not object, the city had ample authority to make the approaches, and exercise control over them.

The city, in the exercise of its authority, undertook to make a passage-way to the bridge, and there can be no doubt of its obligation to exercise its authority so as not to endanger the lives or limbs of its inhabitants. If stone steps leading from an abutment of the bridge were so situated that no approach could be made which would be safe for the passage of travelers, it was a gross violation of duty on the part of the city in undertaking to make one. Cities have no right to set man-traps throughout their limits, and excuse themselves from liability on the ground that the localities are such that they could not render the places where they were set safe and secure. If they cannot construct works so that they will be safe and secure, they can let them alone. There is no law requiring city corporations to beguile unsuspecting travelers upon dangerous streets and walks with an assurance of safety. We have no hesitation in saying that the city was grossly derelict in its duty in the construction of the passage-way in question without having sufficient guards for the protection of travelers. It does not require an expert to show that a narrow passage-way along a precipice of twelve feet, where a misstep or the slightest accident might precipitate the traveler headlong therefrom, is not the degree of safety and security which the law requires. It is not material whether the expense of rendering the walk safe would have been large or trifling, as the city should have forborne to construct the walk if they could not incur the expense of making it safe. The neglect of duty complained of is, that the surface of the walk was not kept in repair. After the city had constructed a walk, it was its duty to keep it in such repair as to enable travelers safely to pass over it.

The walk was made of boards and plank which had become loose and warped, so that a step upon them was not firm. The evidence abundantly established that the footing of the walk was insecure. It was so narrow that two persons could not conveniently pass over it abreast; on one side the street was raised considerably above the walk, and on the other side there was a precipice of twelve feet. We are of the opinion that travelers have a right in passing along such a place to have, at least, a secure footing, and that it was the duty of the city to provide one. Loose planks, so warped that a traveler

cannot step upon them without dangerous oscillation, may, in the opinion of witnesses, make a safe walk over such a place; but they do not furnish a walk having that degree of safety which the law requires. Sidewalks are to be used by common people, and only a few of them are expected to possess the skill of a Blondin in passing over them.

It appears that the appellee's dress caught upon a protruding nail in the flooring of the bridge, but we have not considered it important to inquire whether the accident in any manner hastened or produced the injury. The jury have found that there was no want of prudence and care on the part of the appellee. Accidents are liable to occur to the most prudent and careful; and it was the duty of the city to keep its walks in repair with reference to them. In *Hunt v. Pownal*, 9 Vt. 411, the court says: "In every case of damage occurring in the highway, we could suppose a state of circumstances in which the injury might not have occurred. If the team had not been too young, or restive, or old, or too headstrong, or the harness had not been defective or the carriage insufficient, no loss would have intervened. It is against these constantly recurring accidents that towns are required to guard in building highways. The traveler is not bound to see to it that his carriage is always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway. If he could be always sure of all this, he would not require any further guaranty of safety, unless the roads were absolutely impassable. If the plaintiff is in the exercise of ordinary care and prudence, and the injury is attributable to the insufficiency of the road conspiring with some accidental cause, the defendants were liable." In the case under consideration, although the appellee used all proper care and caution, if she had walked a little slower, or a little more erect, or had been a little more observant of the flooring of the bridge, or had not made a misstep, the accident might not have occurred.

A sidewalk ought not to be so out of repair that if an accident does happen to a lady's dress by its being stepped upon, or caught upon a nail, her life will be endangered while she endeavors to turn round to relieve it, whether such accident occurs as she is stepping on to the walk, or afterwards, and while she is proceeding thereon.

The correct rule is laid down in *Palmer v. Andover*, 2 Cush. 600, where the court says, that "where the loss is the com-

bined result of an accident and of a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet, if there be no fault or negligence of the plaintiff, if the accident be one which common prudence and sagacity could not have foreseen and provided against, the town is liable": *Kelsey v. Glover*, 15 Vt. 708; Angell on Highways, 275.

Taking all the instructions together, the case was properly submitted to the jury, and we are entirely satisfied with the conclusion at which they arrived.

The judgment of the court below is affirmed.

Judgment affirmed.

DUTY OF MUNICIPAL CORPORATION TO KEEP ITS STREETS IN PROPER REPAIR: *Hutson v. Mayor etc.*, 59 Am. Dec. 528, and note 529; *Erie v. Schwabinger*, 60 Id. 81; *Browning v. City of Springfield*, 63 Id. 345, and note 350; liability of, for rendering streets unsafe: *Perry v. City of Worcester*, 66 Id. 431, and note 437; *City of St. Paul v. Seitz*, 74 Id. 753, and note 762.

LIABILITY OF MUNICIPAL CORPORATION FOR NEGLIGENCE OF ITS AGENTS in the construction of public works: *Templin v. Iowa City*, 81 Am. Dec. 455.

THE PRINCIPAL CASE IS CITED to the point that if a person be injured as the combined result of an accident and a defect in the street or sidewalk, and the accident would not have occurred but for such defect, and the danger could not have been foreseen or avoided by ordinary care and prudence, the corporation will be liable to the party injured, in *City of Lacon v. Page*, 48 Ill. 500; *City of Aurora v. Pulfer*, 56 Id. 276; *Owen v. City of Chicago*, 10 Ill. App. 473; *City of Rockford v. Russell*, 9 Id. 234; *City of Crawfordville v. Smith*, 79 Ind. 310; it is cited in support of the general rule that the authorities of a city, under whose control are its streets and sidewalks, are liable in damages for injuries occasioned by reason of the streets and sidewalks being out of repair, in *City of Decatur v. Fisher*, 53 Ill. 408; *City of Bloomington v. Bay*, 42 Id. 508; *City of Peru v. French*, 55 Id. 322; *City of Alton v. Hope*, 63 Id. 169; *Town of Waltham v. Kemper*, 55 Id. 350; the case last cited making a distinction between villages, boroughs, and cities, created for their own benefit, and towns established by law as civil divisions of a county, merely, and holding that the latter are not liable to a private action for damages occasioned by the neglect of the town authorities to keep their public highways in repair. To the first point stated in the *syllabus*, the principal case is cited in *City of Freeport v. Isbell*, 83 Id. 442; and is cited to the point that when a sidewalk is constructed by a city in a manner dangerous to life or limb, no question can be raised of want of notice of the defect, in *City of Gilman v. Haley*, 7 Ill. App. 352. So it is cited in *City of Rockford v. Hildebrand*, 61 Ill. 158, to the point that the ordinances of a city, when it is sued for injury resulting from neglect in keeping the sidewalks in repair, are properly admitted in evidence, when they tend to show that the sidewalks were constructed under the authority of the city, and that it had taken them and its streets under its cognizance and control.

OSBORN & Co. v. STANLEY.

[35 ILLINOIS, 102.]

SELLER OF MACHINE IS UNDER NO OBLIGATION TO RECEIVE IT BACK, OR MAKE IT ALL RIGHT, under an agreement so to do at time of sale, if it should prove not to be a good machine, unless called upon to perform within a reasonable time after the sale.

WRIT of error to the circuit court of Iroquois County. The opinion states the case.

Wood and Long, for the plaintiffs in error.

Roff and Doyle, and James Fletcher, for the defendant in error.

By Court, BECKWITH, J. This is a suit upon a promissory note; the defense a failure of consideration. On the trial in the court below, it appeared that on or about the 1st of July, 1860, the defendant in error purchased of the agent of the plaintiffs in error a patent reaper and mower, for the sum of \$135. On the sale, the agent of the plaintiffs in error represented that the machine was a good one; and it was agreed that the defendant in error was to take the same and try it, and if it operated satisfactorily, he was to keep it; if it did not, he was to return it, or the agent of the plaintiffs in error would make it right.

The defendant in error took the reaper, used it without complaint that season, and on the 1st of August, 1861, gave his notes, without objection, for the price. The reaper was used during the season of 1861, no offer being made to return it, and no complaint in regard to it. All the notes but the one now in suit were paid without objection. Under these circumstances, the second instruction asked by the plaintiffs, that "if the purchaser was not to keep the article purchased, unless it pleased him, he should have returned it, if it displeased him, at the earliest practicable moment; and if he did not do so, it is not competent for him to prove the article to have been worthless," should have been given as requested, and the modification added by the court, that "if he chooses, however, to keep it, he will be compelled to pay what it is actually worth but no more," was clearly erroneous. The plaintiffs in error were under no obligation to receive back the machine, or to make it all right, unless called upon so to do within a reasonable time after the sale: *Nichols v. Guibor*, 20 Ill. 285; 1 *Parsons on Contracts*, 475; *Buntain v. Dutton*, 21 Ill. 190.

In this respect, so much of the instruction given for the defendant in error as directs the jury, "if the agent of the plaintiffs told the defendant that the machine should be a good one, or he would take it back, or make it all right, then, in order for the plaintiffs to recover, they must prove that they have complied with their agreement," was erroneous, and likely to mislead.

The judgment of the court below is reversed, and the cause remanded.

Judgment reversed.

RETURN OF GOODS IN CASE OF BREACH OF WARRANTY: *Brantly v. Thomas*, 73 Am. Dec. 264, and note 268; *Johnson v. McLane*, 43 Id. 102.

PEOPLE EX REL. BARNES v. STARNE.

[85 ILLINOIS, 121.]

IN ILLINOIS, BILL SIGNED BY PRESIDENT OF SENATE, AND SPEAKER OF HOUSE, AND APPROVED BY GOVERNOR, would be conclusive of its validity and binding force as a law, except for the constitutional provision requiring that all bills, before they can become laws, shall be read three several times in each house, and shall be passed by a vote of a majority of all the members elect.

WHEN BILL IS SIGNED BY BOTH SPEAKERS AND APPROVED BY GOVERNOR, the presumption is raised that it has been constitutionally adopted; but this presumption may be rebutted by the journals of the two houses.

ACCORDING TO ADOPTED THEORY OF LEGISLATION IN ILLINOIS, when a bill has become a law, there must be record evidence of every material requirement, from its introduction until it becomes a law, and this evidence is found upon the journals of the two houses.

BILL PURPORTING TO BE APPROPRIATION ACT IS NOT LAW, though signed by the speakers of the two houses, and approved by the governor, where it does not appear from the journal of the house of representatives to have passed that body.

APPLICATION in the name of the people of the state of Illinois, on the relation of William Barnes, for a writ of *mandamus* against Alexander Starne, as state treasurer, commanding him to countersign, register, and pay an auditor's warrant. The opinion sufficiently states the case.

Grimshaw and Williams, for the relator.

Stewart, Edwards, and Brown, for the respondent.

By Court, WALKER, C. J. This was an application for a peremptory writ of *mandamus*, to compel the state treasurer to

countersign and register an auditor's warrant. The journals of the two houses of the general assembly, not having been returned and filed with the secretary of state, and still being in the hands of the clerks of the two houses, the auditor acted alone upon the bill signed by the president of the senate, the speaker of the house, and approved by the governor, which was regularly deposited in the office of the secretary of state as a valid and binding law. By the defendant it is insisted that whilst the bill has the forms of law, it has in fact never passed by the house of representatives, and consequently has no binding force.

The petition sets up a performance of services, which if the act is binding as a law, entitles relator to a warrant on the treasury, for the sum allowed by the governor. Nor does the return controvert the correctness of the charges made for the services rendered, but relies alone as a defense upon the allegation that there is no law authorizing its payment. The return denies that the bill making the appropriation for the payment of such services, and under which the warrant was drawn, was ever adopted or became a law, and that there is any legal authority for countersigning or registering his warrant. It also alleges that the bill under which it was drawn was never passed by the house, but was substituted for a bill that did pass that body, and was presented to the speaker and by him signed and also approved by the governor.

It appears from the senate journal, that two bills were introduced into and passed that body with precisely the same title. They were entitled, "An act to provide for the ordinary and contingent expenses of the government until the adjournment of the next regular session of the general assembly." One of these bills was numbered 202, and the other 203. The bill in dispute was 202, and contained a section appropriating fifty thousand dollars, or so much thereof as might be necessary, to be disbursed in aid of sick and wounded Illinois soldiers; to defray the contingent expenses of the executive department; for the pay of clerks in the governor's office; of messengers on public service, by order of the governor; of assistants in the adjutant-general's office; quartermaster-general's and commissary-general's office; telegraphing; postage and other incidental expenses. The same to be expended as provided in an act to provide for extraordinary expenditures in the executive department.

It is alleged that bill number 203, which was passed by the house, did not contain all of the provisions contained in bill 202, and that the provisions before referred to were not in the first-named bill. The journals of the senate show that both of these bills were passed by that body, and were sent to the house for its concurrence. The house journal shows that on the fourteenth day of February, 1863, bill numbered 203 was taken up and passed, but no action appears from the journals to have been taken upon bill numbered 202. But the senate journal shows that on the third day of June, 1863, that body received a message from the house informing them that the house had concurred in the passage of senate bill 203, and also that through error the bill 202 was reported back to the senate as having passed the house, and that it did not pass, and asking its return.

Oral evidence was received in the case only to identify the journals of the two houses, and these two bills, but for no other purpose. From that evidence it appears that these two bills were distinguished from each other by the numbers they severally bore, and which had been placed on them by the clerk of the senate. It also appears from the house journal that it was bill numbered 203 which passed that body, and they failed to show that bill numbered 202, the bill in controversy, ever passed the house. No entry in reference to the latter bill is found on the house journals at either the regular or adjourned session. As to that bill, it seems that the house at no time ever took any action whatever, unless it was to request the senate to return it to the house. Thus it is clear from the journals that the bill under consideration was never adopted as a law, notwithstanding it has the signatures of the two speakers and the approval of the governor.

Were it not for the somewhat peculiar provision of our constitution, which requires that all bills, before they can become laws, shall be read three several times in each house, and shall be passed by a vote of a majority of all the members elect, a bill thus signed and approved would be conclusive of its validity and binding force as a law. But this provision having been adopted to prevent improvident legislation, and to prevent the enforcement of bills that were never enacted into laws, the means for its enforcement are implied. It is true that these means are negative and not positive in their character. Whilst neither of the other co-ordinate branches of the government have authority to command its observance, the judicial

and executive departments are not bound to enforce such bills as laws. Whilst they are *prima facie* binding, still, when it appears from the journals that either of these constitutional requirements is wanting, the provisions of the bill will not be enforced. According to the theory of our legislation, when a bill has become a law, there must be record evidence of every material requirement, from its introduction until it becomes a law. And this evidence is found upon the journals of the two houses.

The question has been discussed, whether the journals may be referred to, for the purpose of overcoming the presumption of the validity of a printed act with all the forms of a law. Were the question one of first impression, it might be more embarrassing than it now is, having in numerous cases authoritatively determined, by this and other tribunals of sister states, whose organic laws contain substantially similar provisions to that of ours. In fact, so far as we have been able to find, the decisions, in every case but one, where this question has arisen, hold that the journals may be resorted to for the purpose of invalidating the enactment. We are not, however, prepared to say that a different rule might not have subserved the public interest equally well, leaving the legislature and the executive to guard the public interest in this regard, or to become responsible for its neglect.

The case of *State v. McBride*, 4 Mo. 303 [29 Am. Dec. 636], is perhaps one of the earliest cases in which the question has arisen whether the journals of the two houses might be resorted to for the purpose of showing a want of compliance with the requirements of the constitution. That case involved the question, whether an amendment of the state constitution had been adopted by a two-thirds vote of the two houses, as that instrument required. It was there held that as two thirds of the members had voted for the amendment, it became a part of their organic law. The fact that the court refer to the number of votes cast, is conclusive to our minds that the journals were consulted, and controlled the decision of the court. In that case, the question was raised and insisted upon, that the court had no right to go behind the signatures of the speakers, and the approval of the governor, but the houses were the judges whether they had proceeded constitutionally. But the objection was disallowed when the court made the inquiry and passed upon the question.

In the case of *Thomas v. Dakin*, 22 Wend. 9, this question

was before the court. In the decision of that case, the constitutionality of their general banking law was involved. It was there intimated, but not directly decided, that it must appear that the constitutional requirement, that two thirds of the members of each house must concur in its passage, must be observed. It was however held that the question should have been presented by plea, and the question was not determined in that case. In the case of *Warner v. Beers*, 23 Wend. 103, the same question arose, and it was held that the banks formed under the general law of the state on that subject were not corporations, in the legal acceptance of the term, and that a two-thirds vote was not requisite to the validity of the law. Chancellor Walworth, in delivering a separate opinion in the last-named case, says that upon a demurrer to the declaration, the court will not look beyond the statute book to ascertain whether the act was passed by a two-thirds vote, or by a mere majority, if a court has such power in any mode to institute such an inquiry. But he expressly waives a decision of that question.

The supreme court of Ohio, in the case of *Governor v. Maffett*, 7 Ohio St. 372, held that the journals of the two houses might be resorted to for the purpose of determining whether a person acting as a judge has been properly elected by the legislature. Again, in the case of *People v. Purdy*, 2 Hill, 31, Chief Justice Bronson, in a dissenting opinion, held that when the question was raised, whether an act had been adopted by a vote of two thirds of the members of the legislature, the question may be determined by the journals. This case was taken to the court of errors, where the decision of the supreme court was reversed. A portion of the members of the court placed their decision upon the same grounds that had been taken by Chief Justice Bronson.

In the case of *Debow v. People*, 1 Denio, 9, the supreme court of New York held that it was the duty of the court to examine and decide whether any law falling within the two-thirds clause of the constitution has received the required number of votes to give it validity. It was also held that if it had not, the supposed law was utterly void. And in that case, it is said that the conclusion is sustained, not by mere *dicta*, but upon the express adjudications of the court for the correction of errors. Again, in the case of *Eld v. Gorham*, 20 Conn. 9, it is said: "Although it would indeed be practicable, by an examination of the journals and files of the two branches of the legislature,

to ascertain which those revised acts are, it would in most cases be exceedingly inconvenient, and in some very difficult, to do so, from a want of access to those sources of information." The question in this case was, whether an act embraced in the printed volume of revised laws of the state had in fact been revised; and it is manifest from the opinion that the court regarded a resort to the journals as a legitimate mode of determining whether a law had been properly enacted. It is true, the court says that such a course would be inconvenient, and in some cases difficult, but they say it would be practicable.

In the supreme court of Indiana, in the case of *McCulloch v. State*, 11 Ind. 424, it was held that the journals of the two houses, being required by the constitution to be kept, are conclusive evidence of the facts appearing upon their face. And the case of *Green v. Graves*, 1 Doug. (Mich.) 351, seems to fully recognize the rule that the journals may be resorted to for the purpose of ascertaining whether a law has been constitutionally adopted. In the case of *Fergusson v. Miners' etc. Bank*, 3 Sneed, 609, it is held that where a bill has not been read on three several days, in each house, as required by the constitution, it would fail to become a law.

The case of *Southward v. Palmyra & J. R. R.*, 2 Mich. 287, recognizes the right of the court to look beyond the enrolled bill to determine whether two thirds of the members of each house had voted for the bill, in accordance with the requirements of the fundamental law. It is true, in this case, that the question before the court was whether the constitution required the votes of two thirds of all the members elect, or only of a quorum to pass such a bill. But the fact that the court looked into the journals in determining the question, and decided that the bill had the requisite number of votes, shows that the court exercised the power to go behind the signatures of the speakers, and approval of the governor, to determine the validity of the law. In the case of *Fowler v. Pierce*, 2 Cal. 165, the court held the enrolled bill was *prima facie* valid, but the courts might go behind the bill to ascertain whether all the constitutional requirements had been performed,—its *prima facie* character might be rebutted. Such is the position taken by most, if not all, of the cases before referred to, and seems to be the settled law of those courts. The enrolled bill, or printed volume of laws, will be regarded as having received all the essential requirements to render them valid and bind-

ing, until that presumption is rebutted by the journals of the two houses.

Again, the supreme court of New Hampshire, in an opinion given to the governor of the state, 35 N. H. 579, hold that the journals of the two houses may be inspected for the purpose of ascertaining whether what purports to be a law has received the assent of the two houses in the mode prescribed by the constitution. In that case, the bill was signed by the speakers of both houses, and had received the approval of the governor. They held that in such a case the bill is *prima facie* but not conclusively a law; but where it fails to appear by the journals that one of the houses had concurred in an amendment to the bill, that the presumption was destroyed, and the bill would be held inoperative and void as an enactment; that the evidence of its passage must appear from the journals, or it would not be sustained.

Opposed to these cases, we only find that of *Green v. Weller*, 32 Miss. 650. It was there held by a majority of a divided court that the signatures of the speakers of the two houses, and the approval of the bill by the governor, was conclusive. But the dissenting opinion of Chief Justice Smith maintains the opposite ground, and is, to our minds, the most satisfactory, as being in harmony with the rule adopted by other courts.

Having referred to the decisions of other courts on this question, it may be proper to refer to the cases determined by our own court. The first case in our reports is *People v. Campbell*, 8 Gilm. 466. It was there held that the legislature did not possess the power to repeal a law by joint resolution, without undergoing the three several readings prescribed by the constitution. It is true, it does not appear that any question was raised as to the right of the court to resort to the journals of the two houses to test the validity of the law. But the journals were resorted to, and upon them the case was decided.

The next case is that of *Spangler v. Jacoby*, 14 Ill. 297 [58 Am. Dec. 571]. In that case, it was urged that the law was inoperative and void, because a majority of all the members elect in each branch of the legislature did not concur in its passage. And the court sustained the objection, holding that the ayes and noes appearing upon the journals is the only test of its validity, and that they must appear upon the journals. It was likewise held that the printed statute book is not conclusive evidence of the correctness of a law, but that it may be corrected by the enrolled bill on file in the office of the secretary of state. It

was also held that it may be shown from the journals that a particular act passed in conformity to the requirements of the constitution. That when the validity of such an act is denied, the journals may be appealed to for the purpose of determining the question. It was also held that the signatures of the speaker of the senate, the speaker of the house, and the approval of the governor of the state, to a bill, is presumptive evidence that it became a law under the constitution; but the presumption may be rebutted by the journals of the two houses. And the court, on the evidence afforded by the journals, held that the constitutional requirements had not been observed, and that the law was inoperative and void.

The next case is that of *Turley v. Logan County*, 17 Ill. 151. It was there held that the journals must show that the constitutional requirements had been observed. The court also fully recognize the principle announced in the case of *Spangler v. Jacoby*, 14 Id. 297 [58 Am. Dec. 571]. The journals having been produced, it appeared that the same legislature had corrected their journals at a subsequent session from the minutes of the clerk, so as to conform to the constitutional requirements; this was held to be sufficient, and the validity of the law was sustained.

The next case is that of *Prescott v. Board of Trustees of Ill. & Mich. Canal*, 19 Ill. 324. It was there held that an act was inoperative, because the journal failed to show that the senate had concurred in an amendment to the bill adopted by the house. The journals were inspected, and the court held that they overcame the presumption created by the signatures of the speakers of the two houses, and approval of the governor. The case of *Spangler v. Jacoby*, 14 Id. 297 [58 Am. Dec. 571], was again referred to and approved, as announcing the correct rule. The case of *Supervisors v. People*, 25 Id. 181, limits the rule adopted in *People v. Campbell*, 3 Glim. 466. It is there held that although the journals failed to show that the bill was read three several times in each house, the constitution not requiring that fact to be recorded, the law would not for that reason be invalid. But it was there said, in accordance with the rule in the case of *Spangler v. Jacoby*, 14 Id. 297 [58 Am. Dec. 571], that under the constitution it was requisite to the validity of an act that the ayes and noes should appear upon the journals.

Upon an inspection of the house journal, it appears that the bill in controversy was never put upon its passage. It does

not appear to have been read in the house, or any vote taken upon either reading or its passage. The journal is wholly silent as to this bill, and it does not appear that the ayes and noes were called and spread upon the journals upon its passage, or that a majority of the members elect voted for its adoption. We have seen that all the cases in which the question has been presented to this court hold that this fact must appear upon the journals as a requisite to the validity of a law. This being wanting, the law is a nullity, and the auditor was not authorized to draw the warrant, nor the treasurer to countersign and register it. The journals do show, however, that a bill of the same title, but containing different provisions, did pass the house; and owing to the similarity of the titles of the two bills, or by some other means, this bill was signed and approved. This appears by the journal of the house, and from its message to the senate, in which they say that the bill never passed that body.

To hold this to be a valid law, we would have to reverse all of the former decisions of this court on the question, as well as disregard the current of the decisions of other courts in the different states of the Union. Whatever may have been our inclination had the question been presented for the first time by this case, the weight of authority and the prior decisions of this court must control. But we have reviewed all the cases in which this question has been presented, so far as we have been able to find them, and thus it is seen that the decisions of this court are in harmony with the adjudged cases of other courts.

For these reasons, the writ of *mandamus* must be refused.

Mandamus refused.

BREESE, J., concurred in refusing the *mandamus*.

SUBJECT OF VALIDITY OF STATUTES enacted under constitutions requiring that every act shall embrace but one subject, which shall be expressed in its title, is fully discussed in a note to *Davis v. State*, 61 Am. Dec. 331, 337; and see *Tadlock v. Eccles*, 73 Id. 213; *Tuttle v. Strout*, 82 Id. 108.

ACT OF LEGISLATURE IS PRESUMED TO BE CONSTITUTIONAL: *Boston v. Cummins*, 60 Am. Dec. 717; *Wright v. Wright*, 56 Id. 723; *Louisville etc. R. R. Co. v. County Ct.*, 62 Id. 424; and the power of the courts to declare legislative acts unconstitutional is to be exercised with the most guarded circumspection and care: *Baughner v. Nelson*, 52 Id. 694; and see *Sharpless v. Mayor etc.*, 59 Id. 759; *Lycoming v. Union*, 53 Id. 575; *Santo v. State*, 63 Id. 487, and note 519; *Mayor etc. v. State*, 74 Id. 572.

SUBJECT OF POWER OF COURTS TO RECEIVE EVIDENCE, AND NATURE OF EVIDENCE WHICH MAY BE RECEIVED, in order to determine whether a stat-

ute was so passed as to be invalid, is discussed at length in the following cases and the notes thereto: *Jones v. Jones*, 51 Am. Dec. 611, and note 616; *Spangler Jacoby*, 58 Id. 571, and note 574; *Pacific R. R. v. Governor*, 66 Id. 673.

WHAT ATTACKS MAY BE MADE ON STATUTES SHOWING ILLEGAL ENACTMENT. — 1. *Presumption in Favor of Legal Enactment.* — It is true that an act of the legislature is passed and becomes a law only when it has gone through all the forms made necessary by the constitution to give it force and validity: *Moog v. Randolph*, 77 Ala. 599; *Jones v. Hutchinson*, 43 Id. 721; *Legg v. Mayor etc.*, 42 Md. 203; *Brady v. West*, 50 Miss. 68. But it is a well-established rule in constitutional law, that when the validity of an act of the legislature is assailed for a supposed conflict with the constitution, the legal presumption is in favor of the statute; and before the court will be warranted in declaring it void, a clear conflict with the constitution must be shown to exist. Every intendment must be given in its favor: *Alexander v. People*, 7 Col. 155; *Crowley v. State*, 11 Or. 512; *Rohrbacher v. City of Jackson*, 51 Miss. 735; *People v. Loewenthal*, 93 Ill. 191, 207; *People v. Briggs*, 50 N. Y. 553, and cases cited at head of note from the earlier volumes of this series, treating the doctrine at length. Legal presumptions are likewise in favor of the integrity and wisdom of legislators, as well as the validity of their enactments: *Ogden v. Saunders*, 12 Wheat. 270; *Alexander v. People*, 7 Col. 155; *People v. Albertson*, 55 N. Y. 50; and no law can be impeached for fraudulent motives actuating the legislators, nor on account of corrupt influences brought to bear upon them: *Webster v. City of Little Rock*, 44 Ark. 548; *State v. Hays*, 49 Mo. 604; *State v. Fagan*, 22 La. Ann. 545; *Jones v. Jones*, 12 Pa. St. 350; 8 O., 51 Am. Dec. 611, and cases collected in note 623. So the validity of the title by which *de facto* members of the legislature occupy their seats, cannot be inquired into by the courts for the purpose of affecting the validity of laws enacted by the legislature in which they hold seats: 7 N. E. Rep. 447 (Ohio).

2. *Presumption of Legal Enactment may be Rebutted.* — The presumption in favor of a statute that it was regularly and constitutionally enacted by the legislature, though very strong, may be overcome by competent evidence, and the statute be shown to have never been constitutionally enacted.

But the rule in England is, that the enrollment is conclusive, and that the courts cannot go beyond it to the journals, or the original draft, for the purpose of examining into the contents of a bill, or the passage of a law. The copy of the act enrolled by the clerk of the Parliament, and delivered over into chancery, was the record, which, as long as it existed, was held to import absolute verity: *King v. Arundel*, Hob. 109; and see *Sherman v. Story*, 30 Cal. 256; *Pangborn v. Young*, 32 N. J. L. 29; *State v. Swift*, 10 Nev. 176; *Chicot County v. Davies*, 40 Ark. 209, reviewing the English authorities. In this country, two theories exist touching the effect, as evidence, of a document found in the legal depository of laws, and regularly certified by the usual authorities to have become a law. One is, that such a document is conclusive evidence of its being a law, so that no proof can collaterally establish the contrary. This is in accordance with the English rule, and has been adopted in some of the states. Thus, according to some of the American authorities, if an act is properly enrolled and authenticated, and is deposited with the secretary of state, it is conclusive evidence of the legislative will at the time of its passage, and the courts will not look into the journals of the legislature to see whether, or how, the bill passed: *Sherman v. Story*, 30 Cal. 253; *People v. Burt*, 43 Id. 560; so in Nevada: *State v. Swift*, 10 Nev. 176; *State v. Rogers*, 10 Id. 250; *State v. Glenn*, 18 Id. 34; and the theory is sustained in the following cases: *Pacific Railroad v. Governor*, 23 Mo. 353; 8 C,

66 A.n. Dec. 673; *Brodnax v. Groom*, 64 N. C. 244; *Louisiana State Lottery v. Richoux*, 23 La. Ann. 743; *Suann v. Buck*, 40 Miss. 288; *Duncombe v. Prindle*, 12 Iowa, 1; *Evans v. Browne*, 30 Ind. 514; *Speer v. Plank Road Co.*, 22 Pa. St. 376; *People v. Commissioners etc.*, 54 N. Y. 276; *Pangborn v. Young*, 32 N. J. L. 29; and see *Jones v. Jones*, 51 Am. Dec. 616, note. The other theory is, that a document as above described is *prima facie* a law, but that the courts will receive other evidence, such as legislative journals, to ascertain whether the mandates of the constitution as to the mode of enacting laws were observed regarding it, and if they were not, will adjudge it void: See *Freeholders of Passaic v. Stevenson*, 46 N. J. L. 189; *Gardner v. Collector*, 6 Wall. 499. Such is the theory maintained in the principal case, and affirmed in subsequent cases in the same state: See *Ryan v. Lynch*, 68 Ill. 160, 164, citing the principal case; *Miller v. Goodwin*, 70 Id. 659; *People v. Loewenthal*, 93 Id. 191, 214; and the possibility of overturning the statute roll by the legislative journals exists in a majority of the states: See *Spangler v. Jacoby*, 14 Ill. 297; S. C., 58 Am. Dec. 571, 574, note; *State v. Crawford*, 35 Ark. 237; *Chicot County v. Davies*, 40 Id. 200; *Smithee v. Campbell*, 41 Id. 471; *Monday v. State*, 48 Ala. 115; *Walker v. Griffith*, 60 Id. 367; *Moog v. Randolph*, 77 Id. 597; *State of Florida v. Brown*, 20 Fla. 407; *Division of Howard County*, 15 Kan. 194; *Commissioners v. Higginbotham*, 17 Id. 62; *Taylor v. Wilson*, 17 Neb. 88; *State v. McLelland*, 18 Id. 236; S. C., 53 Am. Rep. 814; *Supervisors v. Heenan*, 2 Minn. 330; *State v. City of Hastings*, 24 Id. 78; *People v. Mahoney*, 13 Mich. 482; *Fordyce v. Godman*, 20 Ohio St. 1; *Osburn v. Staley*, 5 W. Va. 85; *Opinions of Justices*, 52 N. H. 622, 625; *State v. Platt*, 2 S. C. 150; *Berry v. Drum Point R. R. Co.*, 41 Md. 446; *Legg v. Mayor etc.*, 42 Id. 220. Even in those states which have adopted the first-mentioned theory, opinion has vacillated on the subject, owing, to some extent at least, to recent changes in the organic law. As an instance, see *Freeholders of Passaic v. Stevenson*, 46 N. J. L. 173, 184; but compare dissenting opinion of Dixon, J., 46 Id. 183. See also *Rohrbacher v. City of Jackson*, 51 Miss. 735, and dissenting opinion of Tarbell, J., 51 Id. 748; *Brady v. West*, 50 Id. 68, 79; *State v. Mead*, 71 Mo. 266; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446; *People v. Devlin*, 33 N. Y. 278; *Edgar v. Board of Commissioners*, 70 Ind. 338. On the other hand, in a state where the courts may look beyond the enrollment to the journals of the legislature to see if an act was constitutionally passed, it has been gravely questioned whether or not the American courts have done wisely in departing from the English rule regarding the recognition of statutes. It is held that the power is a dangerous one, and should never be exercised in the face of a reasonable doubt. If, admitting all that the journals affirmatively show, the act may have been properly passed, the courts should so presume, and sustain the act: *Webster v. City of Little Rock*, 44 Ark. 536, 549; they are not at liberty to treat as void duly authenticated acts of the legislature, because the journals do not show that they were passed in accordance with all the rules of parliamentary law, prescribed in the constitution for the conduct of legislative business: *Walker v. Griffith*, 60 Ala. 361, 367; *Chicot County v. Jefferson County*, 40 Ark. 200, 215.

3. *Reading Bills before Passage.* — The familiar constitutional provision that a bill shall be read three times before its passage has been held to be directory merely, and not mandatory, and that a non-compliance with the provision does not invalidate the act so passed: *Miller v. State*, 3 Ohio St. 490; *Pim v. Nicholson*, 6 Id. 178; *McGill v. State*, 34 Id. 264; *Supervisors of Schuyler v. People*, 25 Ill. 181; and see *Vincent v. Knox*, 27 Ark. 279; but the opposite view has also been maintained: *Board of Supervisors v. Heenan*, 2 Minn. 330;

Steckert v. East Saginaw, 22 Mich. 104; Cooley's Const. Lim. 150; and see *Ryan v. Lynch*, 68 Ill. 164, citing the principal case. The constitution of California requires every bill to be read three times at length, unless the first two readings are dispensed with by a two-thirds vote, for reasons of urgency; and every enactment which does not comply with this provision is unconstitutional: *Weil v. Kenfeld*, 54 Cal. 111. But although the requirement in regard to the three readings of a bill is one that should be observed, it is not necessary to the validity of a statute that the journals of the two houses should show the fact, in the absence of a constitutional provision that the observance should be evidenced by an entry upon the journals: *Walker v. Griffith*, 60 Ala. 361; *Vinsant v. Knox*, 27 Ark. 279; and see *Blessing v. Galveston*, 42 Tex. 641; *Commissioners v. Higginbotham*, 17 Kan. 62. The rule is, that if the constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left to the discretion of either house to enter it or not, and the silence of the journal on the subject ought not to be held to afford evidence that the act was not done. In such case, we must presume it was done, unless the journal affirmatively shows that it was not done: *Supervisors of Schuyler v. People*, 25 Ill. 181; *Wabash Railroad Co. v. Hughes*, 38 Id. 186; *Chicot County v. Davies*, 40 Ark. 214; *State v. City of Hastings*, 24 Minn. 78; *Smithes v. Garth*, 33 Ark. 17; *State v. Brown*, 20 Fla. 407, 424. Thus, under a constitutional provision that bills may be read by title under suspension of the rules, if a bill was read by title and passed, and the journal is silent as to the suspension of the rules, the court will, in order to uphold the act, presume that the rules were suspended,—the constitution not requiring that the journals should affirmatively show the suspension: *Chicot County v. Davies*, 40 Ark. 200; and see *Worthen v. Badgett*, 32 Id. 496; *English v. Oliver*, 28 Id. 317; *People v. Loewenthal*, 93 Ill. 191.

A constitutional provision that a bill shall be read on three several days in each house, in order to have the force of a law, does not require that everything which is to become a law by the adoption of the bill shall be thus read. It is enough to read the bill as required: *Dew v. Cunningham*, 28 Ala. 466; S. C., 65 Am. Dec. 362; and see *Webster v. Little Rock*, 44 Ark. 536. So an act incorporating an association by its constitution and by-laws, without reciting them in the act and reading them in the two houses as a part of it, is constitutional and valid: *Bibb County Loan Association v. Richards*, 21 Ga. 592, 612. The provision requiring bills to be read on three several days before their passage has no application to amendments made thereto: *People v. Wallace*, 70 Ill. 690; *State v. Liedtke*, 9 Neb. 490; *People v. Thompson*, 7 Pac. Rep. 142 (Cal.).

4. *Rule as to Yeas and Nays.*—In New York, the constitutional requirement that the yeas and nays shall be taken upon the final passage of a bill, and entered on the journal, was said to be directory merely, and that an act would be valid although the direction was not followed: *People v. Supervisors of Chenango*, 8 N. Y. 317. But this is in conflict with the rule declared in the principal case, and other Illinois decisions, holding that the journals must show a concurrence of a majority of the members elected to each house, on the final passage of a bill, or the act will have no force; and the ayes and noes are the only test of the passage of a bill, and they must be entered on the journals: *Spangler v. Jacoby*, 14 Ill. 297; S. C., 58 Am. Dec. 571; *Wabash Railroad v. Hughes*, 38 Ill. 174; *Ryan v. Lynch*, 68 Id. 160, citing the principal case; *Post v. Supervisors*, 105 U. S. 667. And see *Supervisors v. Heenan*, 2 Minn. 330; *Steckert v. East Saginaw*, 22 Mich. 104; *Osburn v. Staley*, 5

W. Va. 85. But where a state constitution requires the yeas and nays to be called on the final passage of a bill, but not that such vote shall be entered on the journals, the failure to call the yeas and nays, and enter them upon the journals, is held not to affect the validity of a law: *County of Leavenworth v. Barnes*, 94 U. S. 71; compare *Commissioners v. Higginbotham*, 17 Kan. 62; *Division of Howard County*, 15 Id. 194; *Commonwealth v. Jackson*, 5 Bush, 680.

5. *Error in Publication of Statute.* — The publication of a general law must be according to the provisions of law: *Clark v. Janesville*, 10 Wis. 135. But an error in publication, which does not change the substance or legal effect of the statute, will not invalidate the publication: *Smith v. Hoyt*, 14 Id. 252; *State v. Ellis*, 12 La. Ann. 390. An incorrect classification by publishing a general law in the volume of special laws does not prevent such publication from taking effect, and the law is operative: *In re Boyle*, 9 Wis. 264. But a mere voluntary publication by a private individual, not being authorized thereto, is insufficient: *Clark v. Janesville*, 10 Id. 135. If the time of its taking effect is expressly declared in the act, it will operate at that time, whether it may then have been published or not: *Parkinson v. State*, 14 Md. 184; and see *State v. Lean*, 9 Wis. 279; *Peterman v. Huling*, 31 Pa. St. 432.

6. *Requirements as to Title of Statute.* — The subject of constitutional provisions bearing on the titles of legislative acts is fully discussed in *Davis v. State*, 61 Am. Dec. 331, and note 337. Such provisions have recently been adopted in several of the states, and they forbid that any law shall embrace more than one subject or object, which shall be expressed in its title. Their purpose is to require the title of a bill to be such as will inform the public and the members of the legislature of the object of the enactment, and this purpose is accomplished when the title fairly indicates the general object, although it does not indicate the means or method of attaining this object: *Bumsted v. Govern*, 47 N. J. L. 368; *Billings v. Mayor etc.*, 68 N. Y. 413; *Neuendorf v. Duryea*, 69 Id. 557; *Fuller v. People*, 92 Ill. 182; *Montclair v. Ramsdell*, 107 U. S. 147. It is not required that the title should be exact and precise in all respects, if it sufficiently conveys to the mind an indication of the subject to which it relates: *Parkinson v. State*, 14 Md. 184; *Continental Imp. Co. v. Phelps*, 47 Mich. 299; *In re Mayer*, 50 N. Y. 504; *Matter of Application of Dep't of Public Parks*, 86 Id. 437. But an act which contains two or more subjects having no relation to each other will, for that reason, be within the constitutional prohibition, although its title be comprehensive enough to embrace all the subjects contained in it: *State v. McCracken*, 42 Tex. 383. On the other hand, an act which contains in it only such subjects as might properly be embraced in one act, may be invalid, as not being in compliance with the constitutional requirement as to its title: *Grover v. Trustees etc.*, 45 N. J. L. 399, 402; as where the title of the act was, "An act to fix and regulate the salaries of city officers in cities of this state," and the body of the act related only to salaries of officers in a certain city named. The court held the act to be unconstitutional, on the ground that the title was both false and deceptive; false, as it imported a regulation of a class of cities when, in truth, it was applicable to a single city, and deceptive, because no one, on reading the act, could reasonably understand that the body of the act was to have so limited an effect: *Coutieri v. Mayor of New Brunswick*, 44 Id. 58; and see *Everham v. Hullit*, 44 Id. 53; *Rader v. Township of Union*, 34 Id. 509; *Town of Fishkill v. Fishkill etc. Co.*, 22 Barb. 634; *Durkee v. Janesville*, 26 Wis. 607. It is, however, an established rule, that a statute containing matter not within the subject expressed in the title will be declared void only as to such ex-

cess, and the remaining portion will be permitted to stand: *Davis v. State*, 7 Md. 161; S. C., 61 Am. Dec. 341, note; but see *Cutlip v. Sheriff etc.*, 3 W. Va. 588; *State v. Crowley*, 33 La. Ann. 782; unless the provisions are so connected together in subject-matter, meaning, or purpose, that it cannot be presumed that the legislature would have passed the one without the other: *City of Rochester v. Briggs*, 50 N. Y. 565; *Smith v. Commonwealth*, 8 Bush, 112; and see *Mayor etc. v. Relts*, 50 Md. 579; *County Commissioners v. Meekins*, 50 Id. 41; *State v. Mead*, 71 Mo. 266. An act to revise and consolidate the general statutes of the state, embodied in the revised statutes, is not void as being in conflict with the constitutional provision under consideration: *Oshe v. State*, 37 Ohio St. 494; the provision was held to be directory only: 37 Id. 500; *State v. Covington*, 29 Id. 102.

7. *Bill not Duly Signed.* — There are constitutional provisions in most of the states requiring the signatures of the presiding officers of the two houses to be annexed to a bill preparatory to its becoming a law: See *Evans v. Browne*, 30 Ind. 514; and where such a provision exists, its observance is essential to the validity of an act of the legislature: *Moody v. State*, 48 Ala. 115; S. C., 17 Am. Rep. 28; *State v. Glenn*, 18 Nev. 34; *State v. Mead*, 71 Mo. 266; *Legg v. Annapolis*, 42 Md. 203; but in the absence of any such provision, signing is not essential: *Speer v. Plank Road Co.*, 22 Pa. St. 376. The bill, as signed, must be the same as it actually passed the two houses, and a material variance is fatal to the validity of the enactment as a law: *Moog v. Randolph*, 77 Ala. 597; *Smithes v. Campbell*, 41 Ark. 471; *Brady v. West*, 50 Miss. 68; *Prescott v. Trustees etc.*, 19 Ill. 324; but a mere clerical error in the title by which no one could be misled would not invalidate: *People v. Supervisors of Onondaga*, 16 Mich. 254; *Walnut v. Wade*, 103 U. S. 683; *Ohio v. Frank*, 103 Id. 693. And it is not essential to the validity of an act that the journals of the legislature should expressly state that the signing by the presiding officers of the two houses was done in "open session": *State v. Mead*, 71 Mo. 266. Nor does the failure of the presiding officer of the senate to sign a bill, which was afterwards approved by the governor, and which the journal of the senate shows passed the senate by the constitutional majority, affect the validity of the act: *Taylor v. Wilson*, 17 Neb. 88; *Cottrell v. State*, 9 Id. 125. So the signature of the assistant secretary of the senate was held to be a substantial compliance with a constitutional provision requiring all bills to be signed by the secretary of the senate: *State v. Glenn*, 18 Nev. 34.

8. *Approval of Statutes by Executive.* — In approving a statute, it is held that the executive acts as a component part of the legislature, and that his power of approval ceases on the adjournment of the legislature, unless the constitution allows further time for its exercise: *Fowler v. Peirce*, 2 Cal. 165. But it was held in New York that the power of the governor to approve and sign a bill presented to him within ten days previous to the adjournment of the legislature did not cease with the adjournment: *People v. Bowen*, 21 N. Y. 517; affirming S. C. 30 Barb. 24. Compare, on this subject, *Opinion of Justices*, 45 N. H. 607; *Hyde v. White*, 24 Tex. 137; *Stinson v. Smith*, 8 Minn. 366; *Harpending v. Haight*, 39 Cal. 189; *State v. Fagan*, 22 La. Ann. 545; *Seven Hickory v. Ellery*, 103 U. S. 423. In Georgia, it has long been the practice for the governor to take five days after the adjournment of the two houses for the revision of bills passed by the legislature, and to approve and sign them within that time, but not afterwards: *Solomon v. Commissioners etc.*, 41 Ga. 157; see *Darling v. Bosch*, 25 N. W. Rep. 887 (Iowa).

Within the period fixed by the constitution, the governor may deliberate as to the propriety of approving an act of the legislature, and may sign such

act, and erase his signature at pleasure; and until it has passed his control by the constitutional and customary modes of legislation he may reconsider and retract any approval previously made: *People v. Hatch*, 19 Ill. 283. A material variance between the bill which was approved by the governor, and the bill which passed the two houses, invalidates the enactment: *Moog v. Randolph*, 77 Ala. 597; *Jones v. Hutchinson*, 43 Id. 721. And if any material portion of a bill as passed was omitted in the enrolling, so that it may be considered that the act as approved was not passed by the legislature, and does not express the legislative will, the act as approved, at least to the extent that it is affected by the omission, must be held invalid: *State v. Brown*, 20 Fla. 402. But after an act has, in a regular and constitutional mode, passed both houses, and has been properly signed by the proper officers, and has been regularly presented to the governor for his approval, and he has approved and signed the same without mistake, inadvertence, or fraud, and thereafter has voluntarily deposited it with the secretary of state as a law of the state, it has passed beyond his control: *State v. Whisner*, 10 Pac. Rep. 852 (Kan.). But a constitutional requirement that the clerical officer of the house in which a bill originated shall present it as soon as it has been signed by the presiding officers of both houses, and on the same day in person to the governor, is held to be directory merely, and it is not essential to the validity of an act that the journals should show that the requirement has been complied with: *State v. Mead*, 71 Mo. 266; *State v. Hitchcock*, 1 Kan. 178; S. C., 81 Am. Dec. 503. Where an act of Congress was signed by the President, but the year was omitted in his certificate of approval, it was held that the court might determine the year by the attendant circumstances, and the validity of the act be sustained: *Gardner v. Collector*, 6 Wall. 499. See, as to what will be deemed proper approval of act by governor, *State v. Whisner*, 10 Pac. Rep. 852 (Kan.).

9. *Amendment of Statutes.* — A provision found in some of the state constitutions is, that "no act shall ever be revised or amended by mere reference to its title; but the act revised, or section amended, shall be set forth and published at full length." In construing this provision it has been held that it required the setting forth and publication at full length in an amendatory act, not only of the amended section, but also of the original section which was to be thereby amended: See *Langdon v. Applegate*, 5 Ind. 327; *Rogers v. State*, 6 Id. 31; and such is still the construction given to this provision in Louisiana: *Heirs of Duverge v. Salter*, 5 La. Ann. 94; *Walker v. Caldwell*, 4 Id. 297; and see *David v. City of Portland*, 12 Pac. Rep. 174 (Or.). But a different construction has been adopted in Indiana; namely, that the provision only requires that in any revising or amendatory act the new revised act or the new amended section, and not the old act before its revision nor the old section before its amendment, shall be set forth and published at full length: *Greencastle etc. Turnpike Co. v. State*, 28 Ind. 382; *Niblack v. Goodman*, 67 Id. 174, 189; *Waugb v. Riley*, 68 Id. 482, 491, overruling the earlier decisions of that state above cited; and see, as favoring the construction maintained by the later Indiana decisions, *People v. McCallum*, 1 Neb. 182; *People v. Pritchard*, 21 Mich. 236; *State v. Draper*, 47 Mo. 29; *Tuscaloosa Bridge Co. v. Olmstead*, 41 Ala. 9. The provision, however, requires that the title of the act to be amended should be referred to: *Feibleman v. State*, 98 Ind. 516; and an amendatory act which merely gives the number of the section of the revised statutes intended to be amended is held to be void: Id. But statutes which amend others by implication are not within the provision: *People v. Mahaney*, 13 Mich. 482; *Swartwout v. Michigan Air Line R. R. Co.*, 24 Id. 399,

Mok v. Detroit Building etc. Assoc., 30 Id. 522; *Lehman v. McBride*, 15 Ohio St. 573; *Branham v. Lange*, 16 Ind. 497. In Tennessee the provision is, that "all acts which repeal, revive, or amend former laws, shall recite in their caption or otherwise the title or substance of the law repealed, revived, or amended"; and the omission of this requirement renders the amending act inoperative and void: *McGhee v. State*, 2 Lea, 622, 626. If an act is so amended as to embrace a purpose outside of its title, and inconsistent with provisions remaining unrepealed, it is a violation of the constitutional provision, that "no law shall embrace more than one object, which shall be expressed in its title": *Stewart v. Father Mathew Soc.*, 41 Mich. 67.

10. *Miscellaneous*.—The constitutional provision as to the style of the laws, "Be it enacted," etc., has been held to be directory only, and that the legislature need not literally adhere to the formula of words prescribed: *McPherson v. Leonard*, 29 Md. 377; and where the enacting clause was in the form "Be it resolved," instead of "Be it enacted," it was held to be a substantial compliance with the constitutional requirement: *Swann v. Buck*, 40 Miss. 268. And see *Dew v. Cunningham*, 23 Ala. 466; S. C., 65 Am. Dec. 362. But in other states, this provision of the constitution is held to be mandatory, and a joint resolution in relation to a matter which is properly the subject of enactment would be void: *Boyers v. Crane*, 1 W. Va. 176; *May v. Rice*, 91 Ind. 546. So the enacting clause should precede everything which is made and declared to be law; but an act of the legislature is not invalid because such clause is preceded by a preamble: *Barton v. McWhinney*, 85 Id. 481. The omission of the words "senate and," from the enacting clause, renders the act unconstitutional and void: *State v. Rogers*, 10 Nev. 250. But it was held that a statute is not invalidated by the fact that the bill, when introduced, had no enacting clause: *Powell v. Jackson Common Council*, 51 Mich. 129.

Under a provision in the California constitution, that "no bill shall become a law without the concurrence of a majority of the members elected to each house," the court, to inform itself, will look to the journals of the legislature, and if it appears from them that the bill did not pass by the constitutional majority, it will not be regarded as a law: *Santa Clara County v. South. Pac. R. R. Co.*, 18 Fed. Rep. 385 (Cal.); *Railroad Tax Cases*, 13 Id. 722; S. C., 8 Saw. 238. A transcript from the journal record of either house, of its proceedings, properly certified, is admissible in evidence to prove the facts therein recorded, and it is not necessary to produce the original minutes: *Miller v. Goodwin*, 70 Ill. 659. If the original written journals differ from the printed, the former must control: *Santa Clara County v. South. Pac. R. R. Co.*, 18 Fed. Rep. 385 (Cal.).

The judgment of the highest court of a state, that a statute has been enacted in accordance with the requirements of the state constitution, is conclusive upon the national courts: *Railroad Company v. Georgia*, 98 U. S. 359; *Leavenworth County v. Barnes*, 94 Id. 70; so when the highest state court holds a pretended act of the legislature to be void and not a law, the federal courts are bound to hold accordingly: *South Ottawa v. Perkins*, 94 Id. 260; *Post v. Supervisors*, 105 Id. 667; *Re The J. H. Starin*, 15 Blatchf. 473; S. C., 45 Conn. 585; *Hawes v. Contra Costa Water Co.*, 7 Reporter, 100; *Gnd v. State*, 9 Wall. 35; *King v. Wilson*, 1 Dill. 555; compare *Livingston County v. Darlington*, 101 U. S. 407.

All laws passed by the Kansas territorial legislature, until superseded according to the mode prescribed by law, were held to be valid, if their provisions were not in conflict with the federal constitution or that of the state:

State v. Stormont, 24 Kan. 692; and an act was held not to be invalid by reason of its having been approved on a day after the act of Congress admitting Kansas into the Union: *State v. Hitchcock*, 1 Id. 178; S. C., 81 Am. Dec. 503.

LEGISLATURE HAS POWER TO MAKE VOID ACT VALID, by a curative statute, where it is not restrained by constitutional provisions: *Walpole v. Elliott*, 18 Ind. 258; S. C., 81 Am. Dec. 358; and see *Menges v. Dentler*, 75 Id. 616, and note 621. Legislation of a curative character, which is in accord with justice, equity, and sound public policy, and which does not materially interfere with or overthrow vested rights, imposes no new burdens, and does not infringe upon the judicial department of the government, will be upheld: *Johnson v. Board of Commissioners*, 107 Ind. 15; *Ellingham v. Board of Commissioners*, 107 Id. 600; and see *Strosser v. City of Fort Wayne*, 100 Id. 443; *Bryson v. McCreary*, 102 Id. 1.

THE PRINCIPAL CASE IS CITED to the point that a bill passed by the house, but not read in the senate on three different days, and not passed by a vote of the ayes and noes, as required by the constitution, never became a law, and was a nullity, although it was reported back to the house as having passed the senate, and was enrolled and approved by the governor in *Ryan v. Lynch*, 68 Ill. 160; and is cited to the point that it must appear on the face of the journals that a bill passed the legislature by a constitutional majority, in *People v. Loewenthal*, 93 Id. 214; *Osburn v. Staley*, 5 W. Va. 91.

BRILL v. STILES.

[85 ILLINOIS, 306.]

PURCHASER OF LAND BY AGREEMENT ACQUIRES EQUITABLE TITLE WHEN

HE HAS COMPLETED HIS PART OF CONTRACT, by paying the purchase-money, and receiving written evidence of the agreement of the vendor to convey the premises. And such title may always be asserted in a court of equity against the holder of the legal title, whether in the vendor or his vendee, with notice.

AT LAW MERELY EQUITABLE TITLE IS NOT REGARDED, and is unavailing for a recovery or defense against the legal title.

PURCHASER OF LAND FROM GOVERNMENT IN PURSUANCE OF LAW, upon receiving a certificate of purchase, acquires the equitable title to the premises to the same extent that he would by a purchase from an individual owning the fee.

SAME RULES APPLY IN DETERMINING UPON VALIDITY OF TITLE derived from the government as when derived from an individual.

JUNIOR PATENT FROM GOVERNMENT, OR REGISTER'S CERTIFICATE OF ENTRY, WILL PREVAIL in equity over the elder one, if the right on which it is based is prior in point of time to that upon which the elder patent or certificate is founded.

CERTIFICATE OF ENTRY WILL PREVAIL IN EQUITY OVER PATENT based upon a subsequent entry, unless the prior equity has been legally vacated.

DETERMINATION OF COMMISSIONER OF GENERAL LAND-OFFICE, in reference to the validity of a sale of the public lands, concludes no one in his rights.

EQUITY OF BILL IN CHANCERY CAN BE QUESTIONED only by demurrer, or on the hearing.

DEPENDANT IN CHANCERY CANNOT DEMUR TO AND ANSWER same allegations in bill at one time. And after answer it is too late to demur, unless the answer is first withdrawn.

WRIT of error to the circuit court of Lea County. Suit in chancery in which the defendants' motion to dismiss the bill for want of equity upon its face was sustained by the court, and the complainants sued out writ of error. The opinion states the case.

James K. Edsall, for the plaintiffs in error.

George P. Goodman, for the defendants in error.

By Court, WALKER, C. J. This was a bill in chancery, filed to establish a prior entry of a tract of land from the United States government, and to enjoin a suit in ejectment, instituted for a recovery under the junior entry. The bill alleges, and the answer admits, that Rockafeller entered the premises in controversy at the proper land-office on the seventeenth day of December, 1853, and received a certificate of purchase for the same. That being entered with a military land warrant, the sale was subject to be defeated, by a pre-emption being proved at any time within thirty days after the sale. The bill alleges that no such pre-emption was proved within thirty days after the entry of Rockafeller; that complainant purchased the land of him on the sixteenth day of September, 1854, and went into the actual possession of the same, and had so continued till the time he filed the bill.

It likewise appears from the bill and answer that Soule entered the land at the same office on the sixteenth day of June, 1855. Upon this latter entry a patent was issued, dated on the first day of November, 1855, and that Soule conveyed to Stiles on the eighteenth day of July, 1856. It also appears that no patent ever issued on the first entry made by Rockafeller. The answer admits all the material charges in the bill, but seeks to avoid their operation by the allegation that the first entry, for some cause unknown to defendant, was void, and the commissioner of the general land-office so decided, and vacated the entry. A replication was filed to the answer. Afterwards defendant moved the court to dismiss the bill for want of equity, which motion was allowed, and a decree entered accordingly, to reverse which this cause is brought to this court.

A purchaser of land by agreement acquires an equitable title when he has completed his part of the contract, by pay-

ing the purchase-money, and receiving written evidence of the agreement of the vendor to convey the premises. Such a title may always be asserted in a court of equity against the holder of the legal title, whether in the vendor or his vendee, with notice. But at law such a title is not regarded, and is unavailing for a recovery or defense against the legal title. Such a purchase of the government, when made in pursuance of law, confers upon the purchaser the equitable title to the premises, to the same extent as a sale by an individual owning the fee: *Rogers v. Brent*, 5 Gilm. 573 [50 Am. Dec. 422]. In determining upon the validity of a title derived from the government, the same rules apply as from an individual.

In the case of *Isaacs v. Steel*, 3 Scam. 97, it was held that in equity a junior patent or register's certificate of entry will prevail over the elder one, if the right on which it is based is prior in point of time to that upon which the elder patent or certificate is founded. And in the case of *Bruner v. Manlove*, 3 Id. 339 [36 Am. Dec. 551], the same rule is announced and adhered to. It then follows from these authorities, that the register's certificate of purchase to Rockafeller, being prior in point of time to the patent issued to Soule, it conferred an equitable title until that purchase was legally vacated. The certificate itself provided that it might be done upon proof being made within thirty days of a right to a pre-emption. But there is no pretense that there was any such proof made. Nor does it appear that the first entry was illegally made.

It is true that the answer alleges the entry was void, and had been canceled by the commissioner of the general land-office. But no reason is given, or facts shown, why that entry was void. The mere fact that it was so declared by the commissioner of the general land-office did not have the effect of vacating the entry. He is not a judicial officer, and has no power to decree the rescission of contracts. His determination, in reference to the validity of that sale, concluded no one in his rights: *Rogers v. Brent*, 5 Gilm. 573 [50 Am. Dec. 422], and authorities there cited. The power to adjudge and determine upon the validity of a contract, and to hold them void, devolves alone upon the judiciary. The cancellation of the entry by the commissioner was not, therefore, evidence that the first entry was illegal, but that should have been shown by other and legitimate evidence. And until proved to be void, it was binding upon the government and its subsequent grantees. Nor could the agents of the government, by any

act of theirs, prejudice the rights of those claiming under Rockafeller. If the entry was authorized by law, the title passed to him, subject only to be defeated by proof of a right of pre-emption, and if unauthorized, he acquired no title. But until it is shown to have been illegally made, or to have been defeated by proof of a pre-emption, the certificate of purchase was evidence of an equitable title.

According to the uniform practice in courts of chancery, the equity of a bill can only be questioned on demurrer or on the hearing. Whether a bill shows a right to relief cannot be determined upon motion. In this case, the cause should have been set down for hearing upon bill, answer, replication, and proofs. The defendant, by interposing his answer to the bill, waived the right to demur, and this motion can be considered nothing else but an oral demurrer. He could not both demur to and answer the same allegations at one time. After answer, it is too late to demur, unless the answer is first withdrawn. The court below having erred in dismissing the bill, the decree must be reversed, and the cause remanded.

Decree reversed.

CONCLUSIVENESS OF DECISIONS OF LAND-OFFICERS: *Lamont v. Stinson*, 62 Am. Dec. 696; *State v. Bachelder*, 80 Id. 410, and note 422.

PATENTS ARE CONSTRUED SAME AS CONVEYANCES BY INDIVIDUALS: *Moore v. Shaw*, 79 Am. Dec. 123.

TITLE AND RIGHTS OF PURCHASER OF PUBLIC LANDS: *Nelson v. Sims*, 57 Am. Dec. 144; *Touchard v. Crow*, 81 Id. 108. Purchaser of, has equitable title: *Rogers v. Brent*, 50 Id. 422, and note 434.

TITLE AND RIGHTS OF VENDEE IN POSSESSION, having paid the purchase-money: *Peterson v. Orr*, 58 Am. Dec. 484; *Tibeau v. Tibeau*, 59 Id. 329.

THE PRINCIPAL CASE IS CITED in *Robbins v. Bunn*, 54 Ill. 51, as sustaining the doctrine that when the government has sold a tract of land, and received the money of the purchaser, he has acquired rights which the land-officers cannot divest. And if the government afterwards grants the legal title to another, such grantee takes it subject to the equities of the first purchaser, which it is the exclusive province of the judicial tribunals of the country to investigate and determine, without being governed by the action of the land-officers. It is also distinguished from that class of cases relating to pre-emption claims, and in which the proceedings of the land-officers are held conclusive, because judicial in their character, and within their conceded jurisdiction: 54 Id. 51, 52; and see *Danforth v. Morrical*, 84 Id. 456. It is cited in *Hickey v. Stone*, 60 Id. 461, to the point that in chancery, a motion to dismiss the bill has the effect of a demurrer to the bill for want of equity, and may be regarded as an oral demurrer.

MASON v. DOUSAY.

[35 ILLINOIS, 424.]

BILL OF EXCHANGE DRAWN IN ONE OF UNITED STATES, upon a person residing in any other of them, partakes of the character of a foreign bill, and ought so to be treated.

WHERE ALL FACTS CONNECTED WITH INLAND BILL OF EXCHANGE ARE TO TRANSPIRE IN SAME STATE, the law of that state should be applied to ascertain the rights of the parties.

LAW OF PLACE OF PERFORMANCE GOVERNS, in relation to contracts made in one place, to be executed in another.

IT IS PRESUMPTION OF LAW THAT PARTIES TO CONTRACT MADE IN ONE PLACE to be performed in another know the law of the place in which the paper is payable, and that they intend this law shall govern the contract.

HOLDER OF BILL OF EXCHANGE MUST PRESENT IT IN REASONABLE TIME to the party on whom it is drawn, at his place of business.

PAYOR ACCEPTANCE OF BILL OF EXCHANGE IS VALID IN ILLINOIS, and is binding upon the acceptor.

WHERE DEFENDANT CAN RESORT FOR DEFENSE TO LAW OF ANOTHER STATE, he should plead and prove such foreign law.

APPEAL from the superior court of Chicago. The opinion states the case.

Burnham and Martin, for the appellant.

Haines and Story, for the appellee.

By Court, BREESE, J. This was an action of *assumpsit* in the superior court of Chicago, by Dousay against Mason, as acceptor of a bill of exchange, as follows:—

“\$128.05.

MASONVILLE, 14th May, 1861.

“R. Mason, Esq.: Please pay to William Dousay one hundred and twenty-eight and 5-100 dollars, and charge to account of

“Chicago, Ill.

NATHAN D. INMAN.”

The case turns upon the question whether the proof establishes a valid acceptance of this draft.

The appellant insists, as the bill was drawn by a resident of Michigan, in favor of a Michigan payee, on a person who had a mill and store and office there, and where he spent a portion of his time, it must be regarded as an inland bill of the state of Michigan, and must be governed by the laws of that state, which require an acceptance to be in writing.

The facts show, and the face of the bill shows, that it was drawn in Michigan on the appellant in Chicago, and payable there, where the appellant resided and had his place of business. These make the bill, in the opinion of the supreme court of the United States, a foreign and not an inland bill.

In *Buckner v. Finley*, 2 Pet. 586, Mr. Justice Washington, in delivering the opinion of the court, says: "We are all clearly of opinion that bills drawn in one of these [United] states, upon persons living in any other of them, partake of the character of foreign bills, and ought so to be treated."

There can be no doubt, if this were an inland bill, and all the facts connected with it were to transpire in Michigan, the law of that state should be applied to ascertain the rights of the parties.

But where a contract is to be performed in another place, as in the case of a foreign bill drawn in one state and made payable in another, and accepted, the law of the place of performance must govern; for it is reasonable the parties would naturally have in view the laws of the place where the contract is to be performed and to be enforced: 2 Parsons on Notes and Bills, 320. Reference is made in the text to the case of *Sherman v. Gasset*, 4 Gilm. 521, decided by this court, wherein Mr. Justice Lockwood, after an able review of all the cases cited on the argument, says: "When the question is settled that the contract of the parties is legal, and what is the true interpretation of the language employed by them in forming it, the *lex loci* ceases its functions, and the *lex fori* steps in and determines the time, mode, and the extent of the remedy."

In the same book we find, at page 324, the doctrine to be, in regard to bills of exchange or notes, if they be payable in a particular place, they are to be treated as if made there, without reference to the place at which it is written, or signed, or dated. And in this the text is supported by the authorities to which reference is made in the notes. One of them is the case of *Andrews v. Pond*, 13 Pet. 77, in which the supreme court of the United States declared the general principle in relation to contracts made in one place to be executed in another, to be, that they are governed by the law of the place of performance. To this effect are the cases of *McAllister v. Smith*, 17 Ill. 328 [65 Am. Dec. 651], and *Strawbridge v. Robinson*, 5 Gilm. 470 [50 Am. Dec. 420].

It is a presumption of law that both parties to such a contract know the law of the place in which the paper is payable, and that both parties intend that this law shall govern the contract: 2 Parsons on Notes and Bills, 326.

The bill in this case is drawn on the appellant at Chicago, and so averred in the declaration, and the acceptance is al-

leged to have been in Chicago. These facts were traversed by the plea of *non assumpsit*. Were they proved? The first fact is proved by the face of the bill. As to the other facts, the testimony is, that some time in the summer of 1861, toward fall, he demanded payment of the bill of Mason, in Delta County, Michigan; that Mason looked the draft over, and said "it was all right, and that he told Mr. Dousay that he would pay it in the course of thirty or sixty days."

The inference the court below was authorized to draw from this declaration of appellant is, that Dousay had theretofore presented the bill at the place where payable, and appellant had accepted it and promised to pay it. Why else should he have told Dousay he would pay it in thirty or sixty days if he had not accepted it? The presumption is, also, that the bill was accepted within a reasonable time of the date it bears, and in the regular and usual course of business: *Roberts v. Bethell*, 14 Eng. L. & Eq. 218. The holder of such paper is required to present it in a reasonable time to the party at his place of business. The proof is, that appellant resided and had a place of business in Chicago, and the presumption arises from the declaration of appellant made in Michigan, that appellee had in a reasonable time presented it to him for acceptance at his place of business in Chicago. That a parol acceptance is valid, there is no dispute: 1 Parsons on Notes and Bills, 281.

Upon the other point, that the court excluded the copy of the law of Michigan, offered by the appellant to prove that by those laws a verbal acceptance was not valid, we have only to say, it is a matter of no importance what the laws of that state may be on that point, as this case was not governed by that law, the acceptance having been made in Chicago, where the bill was payable.

Could the laws of that state have been resorted to by the appellant for a defense, according to the decision of this court in *Chumasero v. Gilbert*, 24 Ill. 293, he should have pleaded and proved such foreign laws.

The proof of acceptance may have been slight, but it was sufficient to satisfy the court trying the case; and it is satisfactory to us for the reasons we have given.

The judgment must be affirmed.

Judgment affirmed.

BECKWITH, J., dissenting.

BILLS DRAWN FROM ONE STATE ON ANOTHER ARE FOREIGN BILLS, requiring protest: *Schneider v. Cochrane*, 61 Am. Dec. 204; *Dupre v. Richard*, 43 Id. 218, note.

PROMISSORY NOTE, BY WHAT LAW GOVERNED: *Hunt v. Standard*, 77 Am. Dec. 79, and note 87.

WHEN LEX LOCI CONTRACTUS GOVERNS: *Young v. Harris*, 61 Am. Dec. 170, and note 172; *McAllister v. Smith*, 65 Id. 651; *Spears v. Shropshire*, 68 Id. 206; *Walters v. Whitlock*, 76 Id. 607.

PAROL ACCEPTANCE OF CHECK OR BILL OF EXCHANGE IS VALID AT COMMON LAW: *Barnet v. Smith*, 64 Am. Dec. 290.

LAW OF FOREIGN COUNTRY MUST BE PLEADED AND PROVED AS FACTS: *Peck v. Hibbard*, 62 Am. Dec. 606; *Bufford v. Holliman*, 60 Id. 223, note 230; *Gunn v. Howell*, 62 Id. 785.

THE PRINCIPAL CASE IS CITED TO THE POINT THAT A PAROL PROMISE TO ACCEPT AN EXISTING BILL OF EXCHANGE IS VALID, in *Nelson v. First Nat. Bank*, 48 Ill. 40; *Sturges v. Fourth Nat. Bank*, 75 Id. 596; *Nat. Stock Yards v. O'Reilly*, 85 Id. 551; and to the point that the law of the place of payment must govern as to whether days of grace are allowed on commercial paper, in *Skellon v. Dustin*, 92 Id. 53.

LAWRENCE v. SCHMIDT.

[85 ILLINOIS, 440.]

DRAWER OF DRAFT OR CHECK MUST HAVE DUE NOTICE OF ITS DISHONOR, according to the rules of mercantile law, before he can be held liable for non-acceptance or non-payment.

DRAWER OF DRAFT OR CHECK MAY WAIVE NOTICE OF ITS DISHONOR, or may so act as to amount to a waiver of notice, and when he has not drawn against funds, the necessity for notice does not exist.

PARTY WHO DRAWS UPON ANOTHER MUST PROVIDE FUNDS, and the kind of funds for which he draws, and failing so to do, it is the same as if no funds were provided.

HOLDER OF CHECK DRAWN FOR CURRENT FUNDS, is not bound to receive depreciated paper.

HOLDER OF CHECK CALLING FOR GIVEN NUMBER OF DOLLARS, without designating what character of funds are drawn for, is entitled to demand payment in money, and is not bound to receive depreciated currency.

APPEAL from the recorder's court of the city of Chicago. Suit by the plaintiff, Lawrence, against the defendant, Schmidt, upon the following instrument: "Chicago, May 16, 1861. Edward I. Tinkham & Co.: Pay to Joachim Lawrence, or bearer, twenty-five dollars, and charge the same to account of John Schmidt." This check was presented on the day it was drawn, and payment offered in bank bills at a large discount, instead of money, and were refused. This depreciated currency constituted the only funds the drawer had in the hands of Tinkham & Co. at the time, and notice of the dishonor of

the check was not given to the drawer until after the failure of the drawees, in June, 1861. The finding was in favor of the defendant, and the plaintiff appealed. Other facts appear in the opinion.

Garrison and Blanchard, for the appellant.

Andrew J. Brown, for the appellee.

By Court, WALKER, C. J. According to the rules of the mercantile law, the drawer of a draft or check must have due notice of its dishonor before he can be held liable for non-acceptance or non-payment. But he may waive such notice, or he may so act as to amount to a waiver of notice. It is always presumed that he draws upon funds in the hands of his banker, and hence the necessity of such notice that he may protect his interest and secure his funds in the hands of the party on whom the bill is drawn. But when he has not drawn against funds, the necessity for notice does not exist. When he has not provided funds for the payment of the bill or check, he has no right to expect that it will be honored, and his interests do not require notice of non-acceptance or of non-payment. In such a case, he is presumed to have waived notice, and it need not be given to hold the drawer liable. It has even been held to be a fraud to draw a bill or check where no funds have been provided for its payment.

In the case of *Galena Ins. Co. v. Kupfer*, 28 Ill. 332 [81 Am. Dec. 284], it was held that where a party draws for current funds, the payee is not bound to receive depreciated paper. A party drawing upon another must provide the funds and the kind for which he draws for its payment. If he fails to do so, it is the same as if no funds were provided. The payee, in a case where depreciated funds have been deposited, and his draft is for current funds, is not bound to receive the funds on deposit, nor is the drawee bound to pay other and different funds than those placed in his hands by the drawer.

In this case the check was drawn for money; for dollars and not for bank bills or other kinds of circulating medium. The check was presented on the day it was drawn, and payment in money was refused, but bank bills at thirty to forty per cent discount was offered and refused. It also appears that the drawer did not have cash—money—in the hands of the drawee, and hence notice of non-payment was unnecessary. He had no right to believe it would be paid in money, or that the holder would receive depreciated bills. Upon its non-pay-

ment the drawer's liability was fixed without any steps. The court below therefore erred in rendering judgment in favor of defendant, and it must be reversed and the cause remanded.

Judgment reversed.

NOTICE OF DISHONOR OF PROMISSORY NOTE, SUFFICIENCY OF: *Home Ins. Co. v. Green*, 75 Am. Dec. 361; *Selden v. Washington*, 79 Id. 659; *Fulton v. Maccracken*, 81 Id. 620, and note 625.

WHEN NOTICE OF DISHONOR OF CHECK NOT NECESSARY: *Pack v. Thomas*, 51 Am. Dec. 135.

HOLDER OF CHECK DRAWN FOR CURRENT FUNDS IS NOT BOUND TO RECEIVE DEPRECIATED PAPER, in a case where the drawer of the check has not provided proper funds for its payment: *Galena Ins. Co. v. Kuyfer*, 81 Am. Dec. 284, and note 287.

THE PRINCIPAL CASE IS DISTINGUISHED in *Willette v. Paine*, 43 Ill. 435, and is said to have been decided upon the theory that the bank bills on deposit were depreciated at the time of deposit, and were deposited as depreciated paper.

ROSS AND COMPANY v. INNIS.

[35 ILLINOIS, 487.]

PROBABLE CAUSE IS REASONABLE GROUND OF SUSPICION, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.

WANT OF PROBABLE CAUSE IS MAIN GROUND OF ACTION FOR MALICIOUS PROSECUTION, and must be clearly shown. The burden of proof is upon the party bringing the action, to show that the criminal prosecution was the offspring of malice, and without any probable cause to justify it.

MALICE MAY BE INFERRED FROM WANT OF PROBABLE CAUSE, but a want of probable cause cannot be inferred from malice.

AMONG CIRCUMSTANCES TENDING TO SHOW WANT OF PROBABLE CAUSE, the good character of the accused should be given a prominent place.

ADVICE OF COUNSEL, DELIBERATELY REQUESTED AND OBTAINED, if favorable to the prosecution, will go far, in the absence of other facts, to show probable cause, and to negative malice, in an action for malicious prosecution.

VERDICT SHOULD NOT BE DISTURBED ON GROUND OF EXCESSIVE DAMAGES, in cases of tort, unless it be probable, from the amount of the damages assessed, that the jury has acted under the influence of prejudice or passion.

EMPLOYEE OF MERCANTILE HOUSE IS NOT GUILTY OF EMBEZZLEMENT where, having charge of the money of the concern, and being about to leave their employment, takes money of the firm in his hands equal to the amount due him as the balance of his salary, without the knowledge and against the wish of his employers, and charges the same to himself on their books.

APPEAL from the superior court of Chicago. Action for malicious prosecution. Verdict for the plaintiff, and his damages

assessed at ten thousand dollars. The defendants appealed, and insist that the damages were excessive, and that there was probable cause for the prosecution of the plaintiff. The opinion presents the material facts of the case.

Walker and Dexter, and John J. McKinnon, for the appellants.

Hervey, Anthony, and Galt, and B. S. Morris, for the appellee.

By Court, BREESE, J. This was an action on the case for malicious prosecution brought in the superior court of the city of Chicago by A. G. Innis against William M. and John H. Ross, composing the mercantile firm of William M. Ross & Co., doing business in that city. The case has been three times tried by juries, and three verdicts obtained by the plaintiff, with heavy damages. The first verdict was set aside by the court in which it was rendered, the judgment on the second was reversed by this court and the cause remanded. The result of the remand was another trial and a verdict for plaintiff for ten thousand dollars and judgment thereon. This judgment is brought here by appeal on bill of exceptions, and a reversal prayed on various grounds.

The charge on which the plaintiff was arrested was embezzlement,—that, while a clerk in employment of the defendants, it was his duty to receive, safely keep, and disburse the moneys of the firm. That during the continuance of his employment, he was intrusted with the sum of \$166 by the firm, which, without the knowledge or consent of the firm, and against their will, he feloniously converted and appropriated to his own use, and embezzled from the firm with the intent to steal the same. He was examined on the charge and acquitted.

The question for determination in the several trials had was as to the criminal intent of the plaintiff in taking the money. That he took the money and appropriated it to his own use, the plaintiff never, at any time denied, he claiming the right to take it, as the balance of his salary as cashier, due him from the firm.

The defendants insist, and have always insisted, that there was probable cause for the arrest, and further, before they proceeded to take any steps towards plaintiff's arrest, they obtained the advice of eminent counsel, and acted upon that.

If either of these grounds exists, and was proved, the verdict was wrong, and should have been set aside. If they do

not exist, then another question will have to be considered, and that is, the amount of the damages.

These grounds of defense will be examined. Probable cause is defined by this court to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged: *Richey v. McBean*, 17 Ill. 65; *Jacks v. Stimpson*, 13 Id. 701; *Hurd v. Shaw*, 20 Id. 356. If probable cause for the arrest exists, malice on the part of the prosecutor cannot be considered,—it weighs nothing. The *onus* is upon the party bringing the action to show that the criminal prosecution was the offspring of malice and without any probable cause to justify it,—that the prosecutor had no sufficient reason to believe the accused guilty. The want of this element,—probable cause,—is the main ground of this action, and it must be clearly shown; and though malice may be inferred from the want of probable cause, a want of probable cause cannot be inferred from malice. The burden is on the plaintiff to show affirmatively, by circumstances or otherwise, that the defendant had no ground for the prosecution,—no such reasonable ground of suspicion sufficiently strong in itself to warrant a cautious man in believing that the person arrested is guilty of the offense charged. In addition to the cases above cited, reference is made to the case of *Israel v. Brooks*, 23 Ill. 576, on this point.

In the last cited case, the court said, what those circumstances may be cannot be specified; but we would think, among them, the good character of the party accused would stand out prominently. That is a strong fact, if known to the accuser, to ward off suspicion, to weaken a belief, he being a prudent and cautious man, in the guilt of the suspected party.

A glance at the leading facts must satisfy any one that no probable cause existed for the arrest.

The plaintiff had been in the employment of the defendants more than four years, and had an established character for honesty. During that time, the daily receipts of the concern averaged fifteen hundred dollars, not one dime of which was unaccounted for by the plaintiff. A charge was made against him of a debt due from his brother, which the defendants claimed was to be paid by the plaintiff, and which they sought to set up against his salary. Denying the agreement, or any understanding that his brother's debt was to be charged

against his salary, but insisting it was to come out of certain insurance money, he, on leaving the establishment, appropriated to the payment of salary due the sum of \$166 out of moneys of the firm in his hands. This was known to the defendants, and known, too, that he claimed the right to do so. He was not bound by the rule of the house, that sums over five dollars should be paid out on checks only drawn either by William M. Ross, or by the plaintiff, indorsed by other partners, as he was not a clerk in the meaning of that rule. Nor was that rule always observed, for repeated instances are shown in which it was departed from even as to the clerks. The defendants knew perfectly well, when they caused the plaintiff to be arrested for embezzlement, that he took the money as his legal right, for the balance of his salary, and that he denied the right of defendants to pay his brother's debt out of his salary; that he retained the money as salary, and made the proper entry in the book against himself, and pointed it out to John H. Ross at the time, insisting all the while on his right to take the payment of his salary. An embezzling thief would not so act. There is not one circumstance shown in the case, on this point, tending to make out probable cause, but everything to dissipate such a notion.

On the other point,—that the defendants acted under the advice of counsel,—that defense can never avail unless there has been a full statement of all the facts to the advising counsel, all the facts of which the party is in possession, or which by reasonable diligence he could have ascertained: *Ash v. Marlow*, 20 Ohio, 119. In *Stevens v. Fassett*, 27 Me. 266, it was held if a person with an honest wish to ascertain whether certain facts will authorize a criminal prosecution, lays all the facts before one learned in law, and asks his deliberate opinion thereon, and the advice obtained is favorable to the prosecution, it will go far in the absence of other facts to show probable cause, and to negative malice in the action for malicious prosecution; but if it appears that the party withheld material facts within his knowledge, or which in the exercise of common prudence he might have known, the opinion which he invokes in his defense cannot avail him. To the same effect are the cases of *Bliss v. Wyman*, 7 Cal. 267, and *Kendrick v. Cyssert*, 10 Humph. 291. Many other cases might be cited on the point, but it is unnecessary, as the bare statement of the principle proves its correctness. That the defendants withheld from their counsel several important facts is fully proved.

In the first place, they sought to impress upon Mr. Blackwell that the plaintiff was an ordinary clerk, and subject to certain rules of the establishment, governing the clerks in obtaining money; that the plaintiff had violated those rules in such a way as to make him chargeable with the crime of embezzlement. The fact was, and must have been known to the defendants, that the plaintiff was not in that category at all; that his name never was on the pay-roll of the clerks, and was not, and had not been subject to the rules as to his pay which governed the clerks as to their pay. By this their counsel was misled. The plaintiff's true position was very important to be known by Mr. Blackwell, and if stated to him as it really was, it is not probable this sagacious lawyer would have seen any indication of embezzlement in the act done. Mr. Blackwell's idea undoubtedly was that plaintiff was but a clerk, and subject to the rules as to payment governing them.

Again, the defendants did not tell their counsel, if plaintiff was subject to this rule, that it was violated daily. If counsel had been informed of that fact, he would scarcely have said plaintiff was guilty of embezzlement for violating it for the purpose avowed.

Again, the defendants did not inform their counsel that the plaintiff was the assignee of his brother, against whom they held a balance, and that plaintiff claimed he was to pay this balance out of the assigned effects, and not out of his salary. This fact was never communicated to him, nor did the counsel ever hear of it until after the examination before the magistrate; then for the first time he heard of the assignment.

The defendants also stated to their counsel that it was agreed between them and the plaintiff, that if he would guarantee the debt of his brother, it was all right, and they would furnish him goods, and that in pursuance of that agreement an entry had been made to plaintiff's account, with his knowledge and consent, which was a ratification of the agreement.

Alexander Innis testifies he never heard of such a thing as a guaranty for his purchases; that he was never required to give any security, nor was any guaranty given by anybody to his knowledge, and never heard that plaintiff had become his guaranty. He says the entry of a credit as paid by plaintiff on his account of \$189.48 on the 28d of January, 1858, was made by plaintiff at his special request as an act of friendship, and was confined to that single transaction.

Mr. Murray, the common uncle of the parties, had a conversation with the plaintiff about this matter, at the request of John H. Ross, when the plaintiff told him to remind John Ross that when he took the money he had told him of it, and charged himself with the amount on the books. This was communicated to John H. by Mr. Murray, but it was not communicated to counsel.

These were important facts, and should have been revealed to counsel. The whole truth, all the facts, should have been fully disclosed. As they were not, the defendants are not permitted to seek refuge under the advice given on a garbled statement of the facts.

If justice was the sole object, if the laudable desire of bringing a culprit to punishment moved the defendants, if no wicked spirit stirred them, they would have disclosed the minutest fact to their counsel. Had they told him what has been proved on this trial, as shown in this record, it is not possible to believe Mr. Blackwell would have advised a criminal prosecution. This ground of defense entirely fails.

But there are some facts going to show that the defendants did not act on the advice of counsel, but had made up their minds to prosecute the plaintiff criminally before counsel had been consulted.

Mr. Murray testifies that soon after the plaintiff left the service of the defendants, John H. Ross, one of the defendants, sent for him on particular business. He went to the store and met John, who told him that plaintiff had taken \$166 from the desk; that it was the same as stealing it; and he was resolved on prosecuting him criminally for it. He also said he had a telegram from his brother, from New York, requesting him to arrest plaintiff if he did not pay back the money. He said he would bring him back if he should go to Texas. Witness was advised to see him, and to tell him he would have him arrested if he did not pay the money back. On this being communicated to plaintiff, he told witness to tell John Ross he would not pay back the money; that he took it as the balance of salary due and coming to him, no more; and to remind John Ross that when he did take the money he had told him of it, and charged himself with it on their books, and as to attempting to arrest him, they could not do it without swearing falsely, and if they did, he would take them up for it. This was stated to John Ross, and he replied he would arrest him in a short time, and we will see how he will like to

be sent to Joliet. The witness warned Ross that he had better be cautious; that by arresting him he might place plaintiff in a better position than he was in before. Ross replied to this, "Nonsense; how could he fight such a house as this." Afterwards, on the return of William Ross from New York, the same witness states that he said to witness plaintiff had had the presumption to take \$166 from the desk, against the well-known regulations of the store, and that he was resolved to make an example of him; he would let him see if he could play such tricks with him with impunity; and if he did not pay it back, he would ruin him,—he would make him; that he would never get a situation in Chicago as long as he lived; that they would arrest him and take him before a police magistrate, etc. On being asked what he wanted plaintiff to do, he replied he wanted him to pay back that money. Witness then stated, if desired, he would see plaintiff once more and tell him his determination. Saw plaintiff accordingly, when he said no threats should compel him to pay back what was justly his own, no matter from what quarter they came; that he only took what was due to him and no more; that the money taken was the balance of salary coming to him, and to remind Ross that he never promised to pay the balance of his brother's account; that whatever passed on that subject depended upon the proceeds of his brother's assignment, and did not amount to a promise. This was communicated to William Ross, but he did not communicate it to his counsel.

These facts show a previous determination by defendants to arrest plaintiff on a criminal prosecution, before they had consulted counsel; and that consultation was a mere cover to carry out their own wicked intentions.

These facts go far to show that the defendants did not intend to be governed by the advice of counsel, whatever it might be. They had formed a previous determination to prosecute him, at all hazards, for a crime which they had every right to know the plaintiff had not committed.

The evidence fully establishes malice on the part of the defendants. In addition to what we have cited above, as evidence of malice, one of the defendants, on the investigation before the magistrate, and after the plaintiff had been discharged, said: "If anybody comes to me to inquire after plaintiff's character, I will say that he stole \$166 from me, and that he is a thief and a liar."

Now as to question of damages: Here have been three ver-

dicts finding heavy damages in each. Apart from the principle that courts seldom disturb verdicts on the ground of excessive damages, after three trials, having the same result, it must be a very strong case indeed in which this court, in an action sounding wholly in damages, will interpose to set the verdict aside: *Wolbrecht v. Baumgarten*, 26 Ill. 294.

This court has held that a verdict should not be disturbed on account of excessive damages in cases of tort, unless it be probable, from the amount of damages assessed, that the jury has acted under the influence of prejudice or passion: *Schlencker v. Risley*, 3 Scam. 484.

To judge from the amount of damages assessed, whether the jury have acted from prejudice or passion, the circumstances of the case must be well considered. Here, in this case, was a causeless attempt, by a wealthy house, to blast forever the character of a young man just entering upon the active pursuits of life, with no endowment but his talents, fair character, and uniform integrity. To him these were a priceless possession, in comparison with which the amount awarded by the jury is trifling indeed. We cannot perceive, in the amount assessed, sufficient indications that in finding it the jury were actuated by prejudice or passion, or any unworthy motive. It was a powerful house making a heavy charge against a poor and friendless young man, placed in peculiar circumstances, which, if true, would have consigned him forever to a doom more dreadful than the grave, and forced him to become a wandering outcast on the face of the earth. There is no standard by which damages in such a case shall be measured. Much is committed to the intelligence of the jury; much faith is reposed, and must be, in their sense of right and justice. We cannot say they have gone astray, and cannot therefore disturb this verdict.

A powerful house, possessed of extensive means, which one of the defendants thought it would be the greatest temerity for the plaintiff "to fight" in vindication of his honor and integrity, by their own wrong act and most unjustifiable conduct, and by the decision of a jury of their own selection, has placed the person in a position where he can further illustrate his good qualities, and do business on a respectable capital contributed by the very men who sought his ruin through an infamous charge which they knew was unfounded. Such is retributive justice! The judgment is affirmed.

Judgment affirmed.

NECESSITY AND PROOF OF MALICE AND WANT OF PROBABLE CAUSE to sustain action for malicious prosecution: *Griffin v. Chubb*, 58 Am. Dec. 85; *Williams v. Vanmeter*, 41 Id. 644; *Mooney v. Kennett*, 61 Id. 576, note 580.

WHAT CONSTITUTES PROBABLE CAUSE: *Cockfield v. Braveboy*, 39 Am. Dec. 123; *Griffin v. Sellars*, 31 Id. 422.

SLIGHT EVIDENCE OF WANT OF PROBABLE CAUSE SUFFICIENT: *Williams v. Vanmeter*, 41 Am. Dec. 644; *Grant v. Denel*, 38 Id. 228.

WANT OF PROBABLE CAUSE CANNOT BE INFERRED FROM MALICE: *Griffin v. Chubb*, 58 Am. Dec. 85.

WHEN ADVICE OF COUNSEL PROTECTS FROM ACTION FOR MALICIOUS PROSECUTION: *Bartlett v. Brown*, 75 Am. Dec. 675.

EXCESSIVE DAMAGES, SETTING ASIDE VERDICT ON GROUND OF: *Kimball v. City of Bath*, 61 Am. Dec. 243, and cases collected in note 245; *St. Martin v. Demoyer*, 61 Id. 494, and note 499; *Peoria Bridge Assoc. v. Loomis*, 71 Id. 263, and note 267; *Terre Haute etc. R. R. Co. v. Vanatta*, 74 Id. 96.

EMBEZZLEMENT, WHAT CONSTITUTES CRIME OF: See *Commonwealth v. Libbey*, 45 Am. Dec. 185; *Commonwealth v. Hays*, 74 Id. 662.

THE PRINCIPAL CASE IS CITED to the definition of "probable cause," as stated in the first point in the syllabus, in *Chapman v. Caurey*, 50 Ill. 515; *Splane v. Byrne*, 9 Ill. App. 394; *McDavid v. Blevins*, 85 Ill. 241; *Davie v. Wisher*, 72 Id. 286; *Palmer v. Richardson*, 70 Id. 546; *Barrett v. Spaide*, 70 Id. 410; and is cited in the following cases to the points stated: In order to maintain an action for malicious prosecution, the plaintiff must affirmatively establish that the defendant instituted the prosecution without probable cause: *Comisky v. Breen*, 7 Ill. App. 371; *Palmer v. Richardson*, 70 Ill. 545; *Mitchinson v. Cross*, 58 Id. 369. Malice, without want of probable cause, will not support the action; both must concur, though malice may be inferred from want of probable cause: 58 Id. 370; *Barrett v. Spaide*, 70 Id. 410; *Thompson v. Force*, 65 Id. 371; *Roy v. Goings*, 112 Id. 663; *Krug v. Ward*, 83 Id. 608. If a party communicates to counsel all the facts bearing upon the guilt of the accused, of which he has knowledge, or could have ascertained by reasonable diligence, and in good faith acts upon the advice of such counsel, he cannot be held responsible for his conduct in an action for malicious prosecution: *Barrett v. Spaide*, 70 Id. 413, 414; *Brown v. Smith*, 83 Id. 298; *Anderson v. Friend*, 71 Id. 479; it is, however, a question of fact, in such cases, whether the party has fairly communicated to his counsel the facts within his knowledge, and used reasonable diligence to ascertain the truth, as also whether he acted in good faith upon the advice received from counsel, to be determined by the jury from the evidence: Id. See, on the points decided in the principal case, *Murphy v. Hobbs*, 7 Col. 541, 553; *Kaufman v. Wicks*, 62 Tex. 234; *Wright v. Hanna*, 98 Ind. 217; *Strickler v. Greer*, 95 Id. 596; *Olson v. Neal*, 63 Iowa, 214; *Woodworth v. Mills*, 61 Wis. 44; S. C., 50 Am. Rep. 135; *Pipkin v. Hawcke*, 15 Mo. App. 373; *Hahn v. Schmidt*, 64 Cal. 284; *Sharpe v. Johnstone*, 76 Mo. 660.

BRUSH v. FOWLER.

[36 ILLINOIS, 52.]

ONE NOT PARTY TO JUDGMENT OR DECREE CANNOT BE INJURIOUSLY AFFECTED THEREBY.

WRIT OF POSSESSION RUNS ONLY AGAINST PARTIES TO SUIT in which it is issued, or against those who have come into possession under them since the commencement of the suit.

WRIT OF POSSESSION ISSUED IN SUIT TO FORECLOSE MORTGAGE will not run against a person in possession of the premises before and at the time of the commencement of the suit, who is not made a party thereto.

WRIT OF ASSISTANCE ISSUED IN SUIT TO FORECLOSE MORTGAGE will not justify the officer to whose hands it may come, in putting out of possession of the premises a person who was neither a party to the suit nor named in the writ; but to protect himself in an action of trespass brought by the party who was put out of possession, he will be required to show a decree, as well as the writ.

OFFICER TO WHOSE HANDS WRIT OF ASSISTANCE COMES, finding person in possession who is not named in the writ, is thereby informed that the judgment was not against such person; and in such case he should return the writ with the fact that such person was in possession of the premises, and that he was therefore unable to execute it.

EVEN IF OFFICER WOULD BE PROTECTED IN EXECUTION OF WRIT, upon person not amenable thereto, the party suing it out and causing it to be improperly executed cannot be justified, nor can he claim any rights or immunities under it, nor can any person through him.

PERSON IN QUIET POSSESSION OF REAL ESTATE CLAIMING AS OWNER may obtain an injunction to restrain others from dispossessing him by means of a writ of possession issued on a judgment to which he was not a party; or if he has been dispossessed under such a writ, he may resort to his action of forcible entry and detainer to restore him to the possession from which he has been forcibly and unlawfully ejected.

DAMAGES ARE NOT RECOVERABLE IN FORCIBLE ENTRY AND DETAINER; but if damages are allowed which are only nominal in amount, the judgment will not be reversed therefor.

BILL in equity. The opinion states the facts.

Douglass and Craig, and J. C. Fitnam, for the appellant.

A. Tyler and T. G. Frost, for the appellee.

By Court, BREESE, J. This case turns upon the question whether the court decided correctly in refusing certain proof offered by the appellant, the defendant in the court below.

The action was for forcible entry, and the plaintiff, it is admitted, made out a *prima facie* case, one which entitled him to recover unless the defendant could establish a legal defense by the evidence he proposed to offer.

To make out this defense, the defendant offered in evidence the writ of possession granted by the court, in connection with the mortgage and decree of foreclosure, and sale, and deed by

the master, for the purpose of showing authority to take possession of the premises.

The record shows that the foreclosure suit was in the name of John Piatt, guardian of the children of John Thompson, against Abel Austin, David Mason, A. B. Coddington, Warren C. Willard, and Jacob S. Chambers. The record shows that the writ of possession was directed to run and did run against these defendants, and all persons claiming under them since the commencement of the suit. The evidence shows that appellee went into possession some time prior to the commencement of the chancery suit, and was in peaceable possession at the time of the commencement of the suit, and of the entry of the decree, and issuing the writ under David Mason one of the defendants. He was not made a party to the foreclosure suit, and was not therefore concluded by the decree: Story's Eq. Pl., sec. 151. A writ of possession can only go against the parties to the suit, or against those who have come into possession under them since the commencement of the suit: *Frelinghuysen v. Colden*, 4 Paige, 204; *Van Hook v. Throckmorton*, 8 Id. 83; *Sea Ins. Co. v. Stebbins*, 8 Id. 565.

These cases go the full length of holding that a party in possession before and at the time of the commencement of the suit is not affected by the decree, or subjected to the writ of assistance. This being the law, appellant could not use this decree and writ as a justification of his entry into the premises. None of the facts offered to be given in evidence would justify the forcible dispossession of appellee in the manner stated in the complaint, and as appears by the sheriff's return. By that, it seems, he put appellee out of the house, — forcibly, of course, — and put Piatt in.

We understand the doctrine to be universally recognized, that no one can be injuriously affected by a judgment or decree of any court, who was not a party to such judgment or decree. The decree, therefore, and writ of assistance were as to appellee of no effect. The former did not conclude his rights, nor could the latter be enforced against him. Piatt should have brought an action of forcible detainer against him, in which, from all that is shown and proposed to be proved, he might recover the possession. The rights of appellant are not superior to those of Piatt.

But it is said, the sheriff having the writ of assistance, was bound to execute it, and he was therefore justified in putting the appellee out and putting Piatt in possession.

The writ not being against appellee on its face, but against other and different parties, we are unable to see how the sheriff can be justified in executing it upon the appellee. Appellee was not named in the writ, and the sheriff was informed by it that the judgment was not against him, but other parties. He should then have returned the writ with the fact that appellee was in the possession of the premises, and so he was unable to execute it.

Before the officer could justify under this writ in an action of trespass brought by the appellee against him, he would be required to show for his protection a judgment as well as the execution: *Jansen v. Acker*, 23 Wend. 480. Where neither contains the name of the party whose property is seized, we cannot perceive on what principle the officer can justify the seizure. But the officer is not a party in this proceeding, and if it be admitted he would be justified by the writ if he were a party, the party suing it out and causing it to be executed in the manner it was executed, cannot be justified, nor can he claim any rights or immunities under it, nor any person through him. Piatt having no right to dispossess appellee by the mode he adopted, his assignee can acquire no rights thereby. If the appellee did attorn to Piatt, if his tenancy had expired and he held over wrongfully, the law, by its quiet and peaceful operation, afforded a complete remedy. This case is in principle quite like the case of *Goodnough v. Sheppard*, 28 Ill. 81, in which it was held that a person in the quiet possession of real estate, claiming as owner, might obtain an injunction to restrain others from dispossessing him by means of a writ of possession issued on a judgment to which he was not a party. So the appellee in this case could have applied for and obtained an injunction, or waiving that, can resort to the action he now prosecutes, to restore to him the possession from which he has been forcibly and unlawfully ejected.

As to the verdict for one cent damages, though damages cannot be allowed in such action, we will not reverse the judgment for that cause, the merits being so clearly with the appellee.

The judgment must be affirmed.

Judgment affirmed.

BECKWITH, J. I do not concur in so much of the reasoning of the court as would render an officer liable in trespass for executing a writ of possession or writ of assistance. In my judgment an officer is protected in executing such a writ,

whether rightly or wrongfully issued. The writ requires him him to take possession of certain specified property, without regard to who is in possession of the same; and no court ought to allow its officer to be treated as a trespasser for executing its mandate.

JUDGMENTS ARE BINDING ONLY ON PARTIES AND PRIVIES: *Lipscomb v. Postell*, 77 Am. Dec. 651, and note.

WRITS OF ASSISTANCE: See this subject fully treated in the note to *Wilson v. Polk*, 51 Am. Dec. 152-158; see also *Schenck v. Conover*, 78 Id. 95, where the proper mode of proceeding at foreclosure sale to obtain possession is laid down. Writ of possession will never run against persons not parties, unless they entered *pendente lite*: *Leindecker v. Waldron*, 52 Ill. 235; and *Gilcrest v. Magill*, 37 Id. 300, both citing the principal case; and see, to the same effect, *Schenck v. Conover*, cited *supra*.

BOSTWICK v. WILLIAMS.

[36 ILLINOIS, 65.]

IT IS NOT ESSENTIAL TO PERFORMANCE OF COVENANT, BY VENDOR, TO CONVEY by "a good and sufficient deed of general warranty" that his wife should join in the deed and release her right of dower. If he tenders a deed executed by himself alone, containing the covenant stipulated for, that is a performance of his agreement.

COVENANT TO CONVEY BY DEED OF GENERAL WARRANTY amounts to no more than an engagement that it shall bar the covenantor and his heirs forever from claiming the land, and that he and his heirs shall undertake to defend it when assailed by a paramount title.

COVENANT OF GENERAL WARRANTY DOES NOT INCLUDE COVENANT AGAINST ENCUMBRANCES.

POSSIBILITY OF DOWER IS NOT ENCUMBRANCE, within sense of covenant against encumbrances, for such a covenant implies a settled, fixed encumbrance.

COVENANT OF GENERAL WARRANTY IS USUALLY TREATED AS SYNONYMOUS with covenant for quiet enjoyment, since the same concurrence of circumstances is necessary to their breach, and they equally possess the capacity of running with the land, and the rule as to the measure of damages is the same in both.

COVENANT OF GENERAL WARRANTY IS NOT BROKEN UNTIL EVICTION of something equivalent thereto.

GRANTEE IN DEED WITH COVENANT OF GENERAL WARRANTY may recover on the covenant for such injury as he suffers by reason of the recovery by the wife of the grantor of dower in the property conveyed, the right of dower not having been released by the deed.

ASSUMPSIT on certain promissory notes. The opinion states the facts.

Bull and Nash, for the plaintiff in error.

W. C. Goudy, for the defendant in error.

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By Court, BREESE, J. It is a strong presumption that the note was given for the land, and in the absence of any proof to rebut it, the presumption must prevail.

The contract with the plaintiffs was, that on payment of the notes with the interest, they would execute and deliver to defendant a good and sufficient deed of general warranty for the premises, and the defendant was to take immediate possession of the same.

It is in proof that before suit brought, on the very day of its commencement, plaintiffs presented the note to defendant for payment, and tendered him a warranty deed in the usual form, dated December 27, 1856, for the premises described in the contract, executed by them on the first day of July, 1862. The defendant replied to the demand and tender, that he had not the money, and was unable to pay the note.

It is in proof that on the first day of July, 1862, the plaintiffs were married men, and had been for some time previous.

The dower right of their wives was not released by this deed. The question then is, Did this furnish a sufficient excuse for the non-payment of the note?

We think not. The covenant was to make a general warranty deed, and nothing more. Such a deed was tendered, and the party was bound to accept it. Even if the covenant was to make such a deed free and clear of all encumbrances, it has been said by a respectable court that a possibility of dower is not, within the sense of such a covenant, an encumbrance, for that means a settled, fixed encumbrance: *Per Story, J., in Powell v. Monson and Brimfield Manufacturing Co.*, 8 Mason, 355.

As the plaintiffs undertook to make a deed with a covenant of general warranty only, it could not be broken until there was an actual eviction, or something equivalent to an eviction: *Beebe v. Swartwout*, 3 Gilm. 179. Such a covenant is usually treated as synonymous with a covenant for quiet enjoyment, since the same concurrence of circumstances is necessary to their breach; they equally possess the capacity of running with the land, and the rules as to the measure of damages are the same as to both: *Rawle on Covenants*, 196.

The covenant, as expressed in the obligation of the plaintiffs, amounts to no more than an engagement that it should bar the covenantors and their heirs from ever claiming the land, and that they and their heirs should undertake to defend it when assailed by a paramount title. We cannot find in the

books any authority for the suggestion that a covenant of general warranty, by itself, includes a covenant against encumbrances, admitting an inchoate right of dower to be an encumbrance.

All the cases cited by appellant are cases in which the covenant against encumbrances was inserted in the deed, and can have no application to this case.

When the deed was tendered to defendant he did not then object that it contained no release of dower. Had he made that the objection, it might have been removed at once by procuring such release.

Making no objection to the deed on the ground now taken would not perhaps preclude him, but being made, we are of opinion the covenant of the plaintiffs was performed by them, and the defendant should receive the deed and pay the note. If, hereafter, the wives of plaintiffs should become widows, and claim and recover their dower in a mode by which the defendant may be injured, he will be able to obtain recompense on the covenants in his deed. It would be unjust to allow him to defeat the payment of the note on this bare possibility, and at the same time retain the possession and enjoyment of the land.

We see no merits in the defense, and accordingly affirm the judgment.

Judgment affirmed.

COVENANTS OF GENERAL WARRANTY. — Covenants of general warranty are said to be equivalent to covenants for quiet enjoyment: *Caldwell v. Kirkpatrick*, 41 Am. Dec. 36; and run with the land: *Logan v. Moulder*, 33 Id. 338; *Moore v. Merrill*, 43 Id. 593. As to the effect of such covenants against existing encumbrances, see *Allen v. Lee*, 48 Id. 352. In *Johnson v. Nyce*, 49 Id. 445, a covenant of general warranty is held to cover a claim for dower. Eviction or some tantamount is necessary to the maintenance of an action for breach of a covenant of warranty: *Estabrook v. Smith*, 66 Id. 445. In *Jones v. Warner*, 81 Ill. 346, citing the principal case, it is held that in order to recover, an actual eviction must be shown, or it must appear that the covenantee was unable to obtain possession under the title derived from the covenantor by reason of the fact that it was inferior to the title under which the land was held by others. As to the measure of damages for breach of the covenant, see *Logan v. Moulder*, 33 Am. Dec. 338, and note.

McCORMICK v. WHEELER, MELLICK, & Co.

[86 ILLINOIS, 114.]

WHETHER INSUFFICIENCY OF SHERIFF'S ADVERTISEMENT OF SALE OF LAND UNDER EXECUTION, in that it merely gave notice that the sale would take place between the hours of nine o'clock, A. M., and the setting of the sun on the same day, instead of specifying a particular hour for the sale, would be ground for setting aside the sale, on motion, would probably depend upon the circumstances of each particular case, to be shown to the court by affidavit; but in order to raise the question, the motion must be made by the defendant in execution, and in apt time, for the objection cannot be taken collaterally, nor by third persons.

AMENDMENT BY COURT, OF ITS RECORDS, IN ACCORDANCE WITH MINUTES entered on the judge's docket, by inserting an order sustaining a motion to set aside a sale of land in satisfaction of an execution, where no entry thereof has been made on the record, is not improper so far as it relates to the parties to the judgment upon which the execution issued, if upon notice to the party against whose interest the motion is made. Nor would the allowance of such an amendment be improper, even pending the trial of an action of ejectment for other premises, where the title of one of the parties depends upon a sale issued under the same judgment subsequently to the setting aside of the prior sale. But such amendment of the record cannot be allowed to have a retroactive effect as against persons not parties to the original record.

ALL MATERIAL AMENDMENTS OF COURT RECORDS must be made with a saving of intervening rights acquired by third persons; and in orders allowing amendments it is proper to express this, by way of removing all doubt; but whether expressed or not, the law makes the reservation.

JUDGE'S MINUTES ARE NOT RECORDS FROM WHICH TO ASCERTAIN JUDGMENT of court, where they consist of memoranda which the judge makes upon his own docket, and which the law does not require him to make, but which are merely kept by him for his own convenience, and to enable him to see that the clerk accurately makes up the record. But these minutes are a proper means of amending the record. Until, however, the amendment is made by entry on the record of what the minutes contain, the public can act upon no other means of information than the official records of the court, as kept by an officer appointed by the law for that purpose.

IN ABSENCE OF ENTRY ON RECORD, CONTENTS OF JUDGE'S MINUTES ARE NOT NOTICE to a purchaser under a junior judgment, of land actually belonging to the judgment debtor, of the action of the court in setting aside a prior sale of other land in satisfaction of a senior judgment, on the ground that the land subjected to the latter sale did not belong to the judgment debtor. And even though such order was entered of record, its effect would simply be to create a prospective lien, and not one which would relate back and overcome an intervening judgment lien.

SALES ON EXECUTION SHOULD NEVER BE SET ASIDE in consequence of failure of title, except upon notice to the judgment debtor.

EFFECT OF SETTING ASIDE SALE ON EXECUTION, in consequence of failure of title, is to create prospective lien. Whether it is retrospective is not a question that could arise between the judgment debtor and creditor, as

between them it could make no difference; and the rights of third persons are not affected, because they are not in court, and an order expressly subordinating their rights would be a nullity. But if the judgment creditor thus procuring a sale under his judgment to be set aside, claims on equitable grounds that the intervening rights of third persons should be subordinated to his lien, he must proceed by bill in chancery, make them parties, and give them an opportunity to defend, and a decree thus made will bind all parties.

ENTRY ON EXECUTION DOCKET, UNDATED AND UNSIGNED, to the effect that a sale under and in satisfaction of an execution had been set aside at a certain term, affords no notice to a subsequent purchaser of other property under a junior judgment against the same debtor, that the prior sale had been set aside, there being no entry of record to that effect.

PARTY IS NOT CHARGEABLE WITH NOTICE OF FACTS WITHIN KNOWLEDGE OF HIS ATTORNEY, where the latter acquired knowledge thereof while acting as the attorney of another party.

EXECUTION CAN BE AMENDED ONLY WHEN MERELY VOIDABLE, and not when absolutely void.

AMENDMENT OF VOIDABLE EXECUTION IS ALLOWED, only when third persons can have no reasonable doubt, from the records, that the execution sought to be amended did in fact issue upon the judgment to which the amendment makes it conform, and are therefore not injured. But no court would ever create an execution by way of amendment where none existed before.

EJECTMENT. The opinion states the facts.

Frederick Sackett and A. Webster, for the appellant.

Charles M. Osborn, for the appellees.

By Court, **LAWRENCE, J.** This was an action of ejectment, depending upon the priority of certain judgment liens. The judgments were against William Marshall, Jr., in the circuit court of Rock Island County, and in the order of time stood as follows:—

1. At the December term, 1857, for \$180.90, in favor of William L. Lee.

2. At the March term, 1858, for \$258.67, in favor of McCarn and Scott.

3. At the June term, 1858, for \$226.79, in favor of Harper and Steel.

4. At the January term, 1861, for \$6,472.42, in favor of Wheeler, Mellick, & Co., the appellees.

5. There was also a judgment rendered June 8, 1859, in the circuit court of the United States, at Chicago, against the same defendants, in favor of Thompson and Barnes, for \$1,180.20.

Executions were first issued, and at about the same time, on the judgment in favor of Lee and on that in favor of Harper

and Steel. The Harper and Steel execution was levied on the premises in controversy, and they were struck off at the sale to the plaintiffs in the execution for the amount of the judgment and costs.

The Lee execution was levied on other lands supposed to belong to Marshall, but to which he seems to have had no title. These lands were bid in at the sheriff's sale by Lee, for the judgment and costs. Both executions were returned satisfied in full. This was in August, 1858.

At the September term, 1859, a motion was made in court to set aside the sale under the Lee judgment. The minutes of the judge, upon his docket, show the motion to have been allowed; but no entry of the order was ever made in the records of the court until the trial of the case at bar.

In October, 1859, Lee, treating his sale as vacated by the supposed order, sued out an *alias* execution on his judgment, under which he redeemed the premises in controversy from the Harper and Steel sale, and they were resold for a sum equal to the redemption money paid by Lee, and the amount of his judgment. Certificates of redemption and sale were duly filed.

In December, 1859, Thompson and Barnes redeemed from the last-mentioned sale under their judgment in the circuit court of the United States. The premises were then sold by the marshal, the certificate of sale assigned to McCormick, the appellant herein, and a deed made to him by the marshal in due season. The deed was recorded in June, 1860, and under it appellant went into possession, and so remained to the commencement of this suit.

The foregoing state of facts, sustained by certain amendments allowed on the trial, and to be hereafter considered, constituted, substantially, the title set up by the defendant below, appellant here. We have stated it first, because the proceedings under which it was acquired were first in the order of time.

The title shown by the plaintiffs below was as follows: The McCarn and Scott judgment; execution thereon February 9, 1861, and levy on the premises in controversy; sale to McCarn and Scott in March, 1861; redemption in March, 1862, by the plaintiffs below, under their judgment of January, 1861; sale after the redemption, at which they bid in the property, and sheriff's deed to them, dated June, 1862. All these proceedings, under the McCarn and Scott and the Wheeler and Mel-

lick judgments, were had after the appellant had procured and recorded his deed.

Before considering the title of the appellant, it is proper to notice an objection taken by him to the title of the appellees, as appearing upon its own face. The sheriff's advertisement of sale, under the judgment and execution in favor of appellees, did not specify any particular hour for the sale, but merely gave notice that it would take place between the hours of nine o'clock, A. M., and the setting of the sun on the same day. It is urged that this advertisement was insufficient, and the sale therefore void. Whether on motion by the defendants in the execution the court would set aside a sale for this reason, would probably depend upon the circumstances of each particular case, to be shown to the court by affidavit. But in order to raise the question, the motion must be made by the defendant in execution, and in apt time. The objection cannot be taken collaterally and by third persons: *Swiggart v. Harber*, 4 Scam. 364 [39 Am. Dec. 418]; *Rigg v. Cook*, 4 Gilm. 336 [46 Am. Dec. 462]; *Phillips v. Coffee*, 17 Ill. 157 [63 Am. Dec. 357].

We now come to the title of the appellant. On the trial of the case in the court below, the judge, on motion of the appellant, permitted the record of the September term, 1859, to be amended by inserting therein an order setting aside the first sale, made in August, 1858, on the Lee judgment. The amendment was made by the minutes entered upon the judge's docket of that term, and upon written notice to Marshall, the judgment debtor, and so far as related to the parties to that judgment it was not improper. As this case was on trial before the court, and without a jury, it is probable that the court allowed the amendment to be made *pro forma*, reserving the consideration of its effect, as to the parties to this suit, until he should pass upon the entire case. Such a practice is not improper. But could this amendment, or rather this creation, of a new record be allowed to have a retroactive effect, as against persons not parties to the original record? If not, then the title of the appellee is paramount, as that of the appellant would stand upon a judgment satisfied of record, prior to the sale under which the appellee claimed and satisfied at the time of said sale.

There is no doctrine resting on a more stable ground, both of reason and authority, than that all material amendments of a record must be made with a saving of intervening rights

acquired by third persons. In an order allowing an amendment, it is proper to express this by way of removing all doubt. But whether expressed or not, the law makes the reservation. For what is the judgment of a court? It does not reside, unspoken and unwritten, in the breast of the judge. It is not to be sought in the minutes or memoranda which the judge makes upon his own docket, and which the law does not require him to make, but which are merely kept by him for his own convenience, and to enable him to see that the clerk accurately makes up the record. These minutes, it is true, are a proper means of amending a record, but until the amendment is made, the public can act upon no other means of information than the official records of the court, as kept by an officer appointed by the law for that purpose. How often have this and other courts expressed the maxim that "a record imports absolute verity"?

Now when, in March, 1861, McCarn and Scott levied their execution on these premises, the Lee judgment had been satisfied by sale, as appeared by the return of the sheriff, which was a public record, and there was no record of the court showing that that sale had been set aside. The motion to set it aside had been made, and the presiding judge had decided to allow it, but McCarn and Scott were not parties to that motion, and they could be held to no further knowledge of what actually occurred in court than was furnished by what the law makes the sole authentic evidence of judicial proceedings, to wit, the record. They bought, then, as innocent purchasers, having the right to believe that their judgment was the oldest unsatisfied lien.

It is urged, however, that appellant's certificates of redemption and of purchase, and his deed under the Lee judgment, were all recorded before the sale under the McCarn and Scott judgment, and were therefore notice to the appellees of appellant's title. This is true; but of what did they apprise the appellees? Simply that the appellant claimed a title under the Lee judgment, and this would, of course, put McCarn and Scott upon inquiry as to the lien of that judgment. But if they referred to the record, they found it satisfied; and there was no order in the record setting the sale aside. Parties cannot be held to notice of what has no legal existence, and we should be going quite too far were we to hold them to notice of informal memoranda, on the docket of the judge, by which the record might possibly, at some future time, be amended,

and require them to act as if such amendment had been already made. The public is bound by the record of a court, and on the other hand, it has the right to abide by it. What we have said in regard to the judge's minutes applies with at least equal force to the unsigned and undated memorandum upon the execution docket.

It is, however, insisted that Mr. Curtis was attorney for both Lee and McCarn and Scott, and that thus the latter had notice of the intention of the court to set aside the Lee sale. All that need be said in regard to this is, that Mr. Curtis is not held to notice of facts as attorney of McCarn and Scott of which he acquired knowledge while acting as attorney of Lee. This principle is so familiar as hardly to need the citation of authorities: *Lowther v. Carlton*, 2 Atk. 242; *Hiern v. Mill*, 13 Ves. 120; *Hood v. Fahnestock*, 8 Watts, 489 [34 Am. Dec. 489]; *Bracken v. Miller*, 4 Watts & S. 102. The English courts have recently manifested a disposition to depart from this rule; but we deem it a principle just in itself, and founded on wise considerations of policy.

The views above set forth in regard in amendments are fully sustained by former cases decided by this court: *Coughran v. Gutchens*, 18 Ill. 390, and *Shirley v. Phillips*, 17 Id. 473, and the numerous cases there cited. The amendment of executions in matters of form, or in cases of variance from the judgment, where it is satisfactorily shown that the execution really issued upon the judgment it purports to describe, depends upon principles which do not apply to the case at bar. An execution can only be amended when merely voidable, and not when absolutely void. Such amendments are allowed only when third persons can have no reasonable doubt, from the records, that the execution sought to be amended did in fact issue upon the judgment to which the amendment makes it conform, and are therefore not injured. But it may be safely asserted that no respectable court ever created an execution, by way of amendment, where none existed before.

But we have also considered the other question presented by the argument of appellant's counsel, and as it is so nearly related, in principle, to the one of which we have been speaking, it is proper that we should express our opinion in regard to it. Assuming that the amendment can be considered as relating to the September term, 1859, or that the order setting aside the sale under the Lee judgment had been made and entered in due form at that time, what would have been its effect as

against the McCarn and Scott judgment? Since August, 1858, that judgment had been the eldest lien. During all that time, a period of over twelve months, McCarn and Scott had a right to rest upon it in quiet as security for their debt. The judgment debtors may have had ample personal property out of which the judgment might have been made, if the owners thereof had not reposed upon the security of their lien. They were lulled into this security by the act of Lee himself, who had caused his judgment to be satisfied of record. Can there be any principle of law which, under such circumstances, would postpone their judgment to that of Lee, and of two innocent parties protect that one who has committed a blunder at the expense of the other who has not?

But there would not only be palpable injustice as between these parties in thus antedating the lien of Lee's revived judgment, but the establishment of such a principle would grossly violate public policy, by destroying faith in public records, and impairing the security of titles. For there clearly can be no security in a system which to-day pronounces a piece of land to be free from all encumbrances and to-morrow allows it to be suddenly covered with liens which relate back through a period of years and overcome intervening titles.

On the 1st of September, 1859, Lee had no lien. It had been lost by his own act since August, 1858. In September, 1859, he sought to revive his judgment by setting aside the sale, and we now assume he did revive it. The counsel for appellant contends that the lien of this revivor related back to 1857, and overreached all intermediate judgment liens. Now, if this be so, we are entirely unable to perceive why the revived judgment would not, upon principle, equally overreach an intervening mortgage or an intervening purchase. Yet we do not understand the counsel for the appellant to go this far. He admits that persons who acquire an interest in the lands of the judgment debtor on the faith of the satisfaction must be protected. But their equity is no stronger than that of a judgment creditor who has reposed upon the facts disclosed by the record, and thus lost the opportunity of making his judgment out of other property of the debtor. It is to be remembered, moreover, that our recording laws place creditors and subsequent purchasers on the same footing.

The cases of *Jackson v. Shaffer*, 11 Johns. 513, and *Ridge v. Prather*, 1 Blackf. 401, are relied upon by the counsel for the appellant. Both were cases where, an execution not having

been issued within a year and a day, the judgment was revived by *scire facias*, and the question was as to the effect of the revivor against intervening encumbrances. In the case in Blackford, the court decide that under the laws of Indiana the lien of the judgment is not lost in consequence of failure to take out execution within a year and a day, although the right to take out an execution without *scire facias* is suspended. But they do not decide or intimate that the lien of the judgment, if it had been lost, would have related back upon being revived by *scire facias*, which is the question at bar. In the case before us, the lien of the Lee judgment was confessedly gone during the time that it was satisfied of record by the first sale. This court has already said, in *Hughes v. Streeter*, 24 Ill. 647 [76 Am. Dec. 777], "When the plaintiff has sold property in satisfaction, his judgment ceases to exist, and when the record entry is vacated it is thereby revived and receives new vitality. The exercise alone of judicial powers equal to that which first made the decision can impart new life to a judgment which has been satisfied." The question before us, then, being purely one of relation, the case in Blackford, which merely decided that the lien had never been lost or suspended, has no bearing.

In the other case, *Jackson v. Shaffer*, 11 Johns. 513, it is impossible to say whether the court decided that the lien of the judgment had never been suspended, or that upon revivor by *scire facias* the lien related back to its rendition, even to the prejudice of intervening encumbrancers. If the latter, we can only say that, justly distinguished as that court at that period was, we cannot adopt a doctrine that seems to us so inconsistent with reason and justice, and one that is certainly unsustained by any other authority, so far as we have been able to discover. A contrary position has been held in subsequent cases in the same court, as well as in various other states: *Jackson v. Benedict*, 13 Id. 533; *Taylor v. Ranney*, 4 Hill, 619; *Tracy v. Tracy*, 5 McLean, 456; *Bank of Mobile v. Ford*, 13 Ala. 431; *Ross v. Weber*, 26 Ill. 223; *Norton v. Beaver*, 5 Ohio, 178; *Eppes v. Randolph*, 2 Call, 103.

Another and conclusive reason why the setting aside the sale under the Lee judgment cannot make the lien created by the order of revivor overreach that of McCarn and Scott's judgment, is, that they were in no way parties to that proceeding, and by a principle of universal law their rights cannot be divested by it. Before the order was made they held the un-

disputed paramount lien. By the order, it is claimed, their lien was substantially destroyed by being subordinated to another. Yet they had no notice that such order would be applied for, and no day in court to protect their rights. On what principle of law, then, can this order be considered other than a nullity as to them?

The practice and the effect of setting aside sales under execution in consequence of failure of title rest on very plain principles. The order should never be made, except upon notice to the judgment debtor. When made after such notice, a prospective lien is created. Whether it is retrospective or not is not a question that could arise between the judgment creditor and debtor, as between them it could not make the slightest difference. The rights of third persons are not affected because they are not in court. An order expressly subordinating their rights would be a nullity. If the judgment creditor claims on equitable grounds that their rights should be subordinated to his lien, he must proceed by bill in chancery, make them parties, and give them an opportunity to defend. A decree thus made would, of course, bind all the parties. An order made as in this case binds only the plaintiff and defendant, leaving the liens of third persons where they stood before.

Judgment affirmed.

NOTICE OF SALE ON EXECUTION: See the note to *Hoffman v. Anthony*, 75 Am. Dec. 704, fully discussing this topic; and see particularly page 707, where the matter of time of sale is treated. In *Jackson v. Spink*, 59 Ill. 409, citing the principal case, it is held that the omission to specify the hour of sale in the advertisement of a sheriff's sale cannot be presented as an objection to the sale by third persons.

COURTS HAVE POWER TO AMEND RECORDS IN ACCORDANCE WITH FACTS: *Hill v. Hoover*, 68 Am. Dec. 70; *Hollister v. Judges*, 70 Id. 100; *Houston v. Williams*, 73 Id. 565; but until the amendment is actually made, third persons cannot act on anything but the official records, kept by the proper officer for that purpose, and all rights previously acquired are in no manner affected by subsequent amendments: *Church v. English*, 81 Ill. 444, citing the principal case.

MINUTES OF JUDGE OR CLERK WHICH HE IS NOT REQUIRED TO KEEP, but which he keeps for his own convenience, are not records, but may be memoranda by which to amend records to conform to the facts: *Sattler v. People*, 59 Ill. 69; and *Steele v. Steele*, 89 Id. 53, both citing the principal cases; and see *Hill v. Hoover*, 68 Am. Dec. 70.

KNOWLEDGE ACQUIRED BY ATTORNEY WHILE TRANSACTING BUSINESS FOR STRANGER does not bind his client, nor charge him with notice thereof: *Martin v. Jackson*, 67 Am. Dec. 489, and note; and see the principal case cited to the same effect in *Campbell v. Benjamin*, 69 Ill. 250, and *Herrington v. McCollum*, 73 Id. 482.

DOLE v. OLMSTEAD.

[86 ILLINOIS, 150.]

WAREHOUSEMAN'S RECEIPT FOR GRAIN DOES NOT CLOTHE HOLDER with any specific or general lien on the property of the warehouseman, although that should consist also of grain put in common bulk with that of the holder of the receipt; but such property of the warehouseman remains subject to sale and transfer, precisely as though such a receipt had not been given; and the holder of the receipt has only the obligation of the warehouseman for proper storage and delivery of his grain, according to the terms thereof, or on default has a right to recover the damages growing out of a breach of the contract.

WHERE WAREHOUSEMAN HAVING IN STORE GRAIN OF VARIOUS PERSONS, for which he has given receipts, together with grain of his own (the whole being kept in one common bulk by the consent of all parties), transfers, by verbal assignment, all the grain thus in store to a creditor to secure his debt, to be held subject to the rights of the different owners, the assignee will hold the property as a trustee for the benefit of all parties in interest, and will be bound to deliver to the receipt-holders all the grain which belonged to them and which was in store at the time of assignment, but beyond that will occur no liability; and whatever grain was in store belonging to the warehouseman, the assignee will have the right to retain and apply to his own debt.

ON ASSIGNMENT BY WAREHOUSEMAN OF BULK OF GRAIN IN WAREHOUSE to secure his own debt, such grain consisting partly of his own and partly of that stored with him, and for which he has given receipts, and there is included in the assignment contracts for the purchase of grain made by the warehouseman, upon which he had advanced some money and received a portion of the grain, the assignee becomes the equitable owner of such contracts, to the exclusion entirely of the holders of the grain receipts from the warehouseman; and the assignee has the right to complete such contracts, and appropriate the grain he may receive upon them to his own debt, after deducting the money he advanced to complete them.

WHERE GRAIN OF DIFFERENT OWNERS BECOMES INTERMINGLED IN ONE COMMON MASS, according to the usage of warehousemen, and without objection by the owners, it becomes common property, owned by the several parties in the proportion in which each contributed to the common stock, and the several owners are subject to sustain any loss *pro rata* which may occur by diminution, decay, or otherwise.

ON ASSIGNMENT BY WAREHOUSEMAN OF MASS OF GRAIN, for the purpose of securing his debt, where such grain was partly his own and partly stored by persons who took his receipts therefor, the assignee purchasing any of such receipts would be subject to sustain his *pro rata* share of the loss occasioned by any deficiency precisely as would the original holders.

HOLDER OF RECEIPT FOR GRAIN IN WAREHOUSE who has become owner in common with others by the intermingling of the grain of all in one common mass, if he has received the full quantity called for by his receipt or a larger proportion than his ratable share, would, in view of a deficiency, be bound to account for such excess received by him in proportion to the loss.

COURT OF EQUITY, AS PART OF ITS ORIGINAL AND INHERENT JURISDICTION, will compel the proper application of a trust fund, and require the trustee to render an account of his proceedings under the trust.

ASSIGNEE OF MASS OF GRAIN IN WAREHOUSE belonging to a number of persons, who by reason of its intermingling have become owners in common, is trustee for all the parties in interest; and where there is a deficiency in the quantity of the grain, and in consequence the several owners are unable to show the respective quantities due them from the mass, a court of equity will have jurisdiction to bring such trustee and all the parties before it, and to do complete justice between them.

BILL in equity. The opinion states the facts.

Leland and Blanchard, for the appellants.

Glover, Cook, and Campbell, for appellees Cushman, True, & Co.

Gray, Avery, and Bushnell, for the other appellees.

By Court, WALKER, C. J. It appears that Fairfield and Weld were engaged as partners in the business of warehousemen, and in buying, selling, and storing grain. During the continuance of their business they became indebted to appellants in the sum of about nine thousand dollars, upon which a judgment was obtained by Martin, we suppose as assignee, in December, 1859, which he assigned to appellants. Execution was sued out on this judgment, and placed in the hands of the sheriff of La Salle County, on the twenty-second day of December, 1859. On the day previous, Fairfield and Weld, to secure this indebtedness, assigned, transferred, and delivered the corn then in store in their warehouse and cribs, as well as certain contracts entered into by them with divers persons for the purchase of corn, upon a portion of which Fairfield and Weld had advanced some money and had received a part of the corn. That in receiving and storing corn on commission, as well as their own, Fairfield and Weld, as is customary with grain warehousemen, stored altogether without discrimination, not having kept any individual's portion separate from the other.

As assignees of Fairfield and Weld, appellants went into possession and delivered corn in store on the grain receipts of Fairfield and Weld, or in lieu of such a delivery purchased their receipts from holders. They likewise received corn on the contracts entered into by Fairfield and Weld, which seems to have been placed in common mass in store. Cushman, True, & Co., holding receipts for corn stored with Fairfield and Weld, brought an action of replevin for about seven thou-

sand bushels of corn against the sheriff of La Salle County, who had levied the execution placed in his hands on the twenty-second day of December, upon the corn found in possession of Fairfield and Weld, which Cushman, True, & Co., recovered on the trial of the cause. When appellants came to deliver out the corn to the various holders of receipts, it was found to be deficient in quantity. Each holder of receipts claimed the full amount placed in store by him. And this bill was exhibited to settle the entire matter between all parties.

It appears that the assignment to appellants was verbal, but the evidence shows that they, at the time, agreed to deliver the corn in store to the different holders of Fairfield and Weld's receipts. They, by the assignment, only acquired the property and the interest of the firm of Fairfield and Weld, subject to all existing liens. When they went into possession it was as trustees, for the benefit of all parties in interest, and they could not rightfully appropriate or divert any portion of the property of other persons, which thus came to their hands, to their own use. They must also be held to account strictly for all such property which thus came to their hands. But by the arrangement they acquired the right to apply all of the firm property acquired by the assignment in discharge of their claim against the firm. They were only bound to deliver the corn belonging to holders of receipts which was in store at the time. Having done so, they were exonerated from further liability. They contracted for no greater liability. And if Fairfield and Weld owned any corn then in store, it became theirs, and they were authorized to retain it.

Appellants likewise became, by the assignment, the equitable owners of the contracts entered into by Fairfield and Weld for the purchase of corn. When that firm entered into such agreements, and advanced their own money, it was on their own account, and for their own benefit, and not for those storing grain with them. Such persons had no interest in, or liens upon, such contracts, or the money advanced, either by Fairfield and Weld or by appellants, to fulfill such agreements. Persons holding grain receipts only had the obligation of the warehousemen for the proper storage and delivery of their grain, according to the terms of their receipts, or, on default, to recover of the bailees the damages growing out of a breach of the contract. The giving of the receipts created no specific or general lien on the property of the warehousemen. Their property remained subject to sale and transfer precisely

as though such receipts had never been given. The property of those storing it remained theirs, the same as if it had been placed in the hands of any other agent or bailee. Appellants, by the assignment, became entitled to complete the contracts for the purchase of corn entered into by Fairfield and Weld, and appropriate the corn thus received to their own debt, after deducting the money advanced to complete them; and it was error in the court below to appropriate this fund to make good the deficit found to exist in the quantity of corn in store.

Appellants, when they purchased up receipts for corn in store given by Fairfield and Weld, had no right to appropriate to themselves the full amount of corn for which they were given. The corn all having been intermingled, according to usage with warehousemen, and without objection of the several owners, it became common property, owned by all in the proportions in which each had contributed to the common stock. This is so from the very necessity of the case, because so soon as it is intermingled, each person's portion loses its identity, and can no longer be distinguished or separated from the common mass. Neither of the owners could point out, separate, or prove that any particular portion was his. Neither can it be shown, when a portion has been lost or misappropriated, whose particular corn it was. It, then, being owned in common, they are all liable to sustain any loss which may occur by diminution, decay, or otherwise, in the same proportion. As there was a deficiency in the quantity in this case, each owner was bound to sustain a *pro rata* portion of that loss. And appellants, by purchasing these receipts, became liable to sustain their *pro rata* share of this loss, precisely as were the persons from whom they purchased the receipts. And so any holders of receipts who have received the full amount, or a larger portion than their ratable share, are bound to account for such surplus over and above their *pro rata* portion.

The only remaining question is, whether a court of equity has jurisdiction of the case. By the assignment, appellants became trustees for all parties in interest, and as such became liable to perform all the duties imposed by that relation. One of the duties of that relation is to account for the proper application of the trust fund. And a court of equity, as a part of its original and inherent jurisdiction, compels the proper application of the trust funds, and requires the trustee to render an account of his proceedings under the trust. Had this prop-

erty remained separate it would be different, as in that case the loss of each owner could have been ascertained, and the remedy at law would have been complete. It will also be observed that there is not a complete remedy at law, as by the confusion in the property each party is disabled from showing the extent of his loss. And those who should first sue would get more than their ratable portion of the property, appellants not being liable to make up the deficiency, unless it could be shown that they had appropriated the grain to their own use. Thus a portion of the owners would be able to obtain no portion of the grain. And they would have no remedy except in a court of equity to compel contribution.

A court of equity has therefore jurisdiction to bring all the parties in interest before the court, and to do complete justice between them. It should ascertain the deficiency of the joint property, and decree that each joint owner share the loss in *pro rata* proportions. And if any of the owners have received from the common stock more than their proportion, that they contribute the excess to those who have not received their proper proportion. And at the same time decree that Fairfield and Weld, or appellants, whichever may be shown to have misappropriated the corn pay to the several owners the losses they may have sustained by the loss of their grain whilst in their hands. Thus complete justice will be done, and a multiplicity of suits and expense avoided.

The decree of the court below is reversed, and the cause remanded.

Decree reversed.

WAREHOUSE RECEIPTS, EFFORT AND TRANSFER OF: See the extended note to *Rice v. Cutler*, 84 Am. Dec. 747.

GRAIN IN MASS IN WAREHOUSE, TITLE TO: See *Chase v. Washburn*, 59 Am. Dec. 623, and note. The principal case is cited in *Sexton v. Graham*, 53 Iowa, 199, 200, to the point that when grain is mixed in one common mass, the owners become tenants in common of the whole mass.

JURISDICTION OF EQUITY OVER TRUSTS: See *Doyle v. Murphy*, 74 Am. Dec. 165.

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BROWN v. COON.

[36 ILLINOIS, 243.]

HOMESTEAD RIGHT IN PREMISES MAY BE LOST under conveyance executed by husband and wife, though they do not relinquish such right in the form required by statute, if in pursuance of such conveyance they abandon possession to the vendee

RIGHTS OF INFANT CHILDREN IN HOMESTEAD ARE UNDER CONTROL OF PARENTS during the joint lives of the latter.

EJECTMENT. The opinion states the facts.

Peters and Smith, for the plaintiff in error.

O'Melveny and Merritt, for the defendant in error.

By Court, LAWRENCE, J. This was an action of ejectment, brought by the plaintiff in error against the defendant in error, and submitted to the court below, on the following state of facts: In 1863, the plaintiff, being then the owner of the premises in controversy, and occupying them as his homestead, conveyed them by deed, executed by himself and wife, to one Belden. The deed contained no release of the homestead, either in its body or acknowledgment. After the execution of the deed, the grantor removed from the house with his family, and gave possession to said Belden, who moved in and occupied the same until he (Belden) sold and conveyed to the defendant in error, when the latter succeeded to his possession. The property was not worth one thousand dollars. On this evidence, the court found for the defendant below, and the plaintiff below now brings the case here.

The naked question is presented in this case, whether the owner of real estate, occupied by himself and family as a homestead, can sell and convey the same for a fair consideration, receive the purchase-money, deliver possession to the vendee, and then turn round, bring an action of ejectment, and recover back the property. If this be indeed the law, let it be so declared; but before the court can be induced to adopt a rule which violates conscience, destroys good faith, and makes the most solemn business transactions of men but a cover for the most shameless fraud, we must be constrained by the will of the legislature, expressed with irresistible clearness, or by a series of adjudications that have ripened into established law. The homestead act is no doubt a piece of wise and benignant legislation. Viewing it in that light, we have given it a liberal construction. But at the same time it is to

be remembered that a homestead right is not the only right which courts regard, and that there are rules of law which they will not overturn, merely because they are invoked to do so in the name of homestead protection.

The counsel for the plaintiff relies on the cases of *Patterson v. Kreig*, 29 Ill. 518, and *Best v. Allen*, 30 Id. 30 [81 Am. Dec. 338], in support of his position that the deed in this case was an absolute nullity for all purposes whatever, and therefore the title to the premises never having passed from the plaintiff, he was able to maintain this action. These are the only cases giving any color to this position.

It is a familiar rule of criticism in regard to judicial decisions, that their authority arises from what the court decides in reference to the facts before it rather than from what the judge who delivers the opinion may say in illustration and support of the ruling of the bench. When it is remembered that judges are often obliged to write a hundred opinions *per annum*, they would be more than human if they did not occasionally use expressions of a general character, which, while perfectly true in regard to the case before them, are at the same time incorrect when pushed to extremes or applied to a totally different state of facts. The very learned judge (Chief Justice Caton) who wrote the opinions in the cases above cited was little liable to this error. In the many hundred pages from his pen, which illustrate our reports, there are few instances in which the generality of the expression needs to be qualified and limited by the nature of the facts. But it cannot be denied that the language of the opinions, in the cases cited, in regard to the invalidity of deeds like that now before the court, is too general and sweeping. We at least so consider it, and while we are still of opinion that the deeds in those cases were inoperative as regarded the homestead rights, they were not absolutely void for all purposes whatever. We have already decided, in *Boyd v. Cuddeback*, 31 Ill. 113, and *Smith v. Miller*, 31 Id. 157, that where the value of the premises exceeds one thousand dollars, a mortgage upon them is good for the excess, though the homestead right does not pass by the deed. An action of ejectment, it is true, cannot be maintained upon such a deed or mortgage, until the homestead has been, in some proper manner, set apart; but the instrument conveying it is not void simply because there is no relinquishment of the homestead in the manner pointed out by the act. The above-quoted case of *Patterson v. Kreig*, 29 Id. 518, upon

which the chief reliance is placed by the counsel for the plaintiff, was a case of this character,—an ejectment brought by a mortgagee. It does not appear from the report that there was any evidence as to the value of the premises, nor was it material. If they were worth less than one thousand dollars, the mortgage was practically inoperative for any form of action, so long as the mortgagor should choose to assert his homestead rights. If they were worth more than one thousand dollars, although the mortgage was at once operative for the surplus, yet it could not be enforced by ejectment until the homestead had been set off, as the court in that action could not determine how far the homestead right would extend. The other case of *Best v. Allen*, 30 Id. 30 [81 Am. Dec. 338], cited by plaintiff, merely decides that the possession of the mortgagor of a homestead, where there has been no waiver, cannot be entered upon by the mortgagee, without process of law.

We think what has been said shows that there is nothing, in the previous decisions of the court which requires us to hold that a conveyance of the homestead without the statutory waiver is, for all purposes, absolutely void.

What, then, under the statute, is the effect of an absolute conveyance of a homestead, without waiver of the homestead right, being less than one thousand dollars in value, and the actual possession at once delivered to the grantee?

It has been assumed by this court, as a proposition hardly requiring argument, in all the cases where the question has been touched, that the homestead right is lost by a voluntary abandonment, without the *animus revertendi*. Although we have held that the infant children have rights in the homestead, yet these rights must necessarily be under the control of the parents during the joint life of the latter. That a continuing occupancy is necessary to the preservation of the homestead right, was held in *Walters v. People*, 18 Ill. 199 [65 Am. Dec. 730], and *Kitchell v. Burgwin*, 21 Id. 45. This view is in entire harmony with both the letter and spirit of the act, as the right wholly arises from the fact of occupancy. It is true, we have decided, in *Green v. Marks*, 25 Id. 221, and *Bliss v. Clark*, 39 Id. 590, that the homestead-owner may, by deed executed by himself and wife in conformity with the statute, transfer the premises, discharged from any encumbrance arising from a prior judgment. Only by recognizing this *jus disponendi* can the homestead be clothed with its full value to the owner. But this principle is not at all in conflict with the

rule that the right is lost by voluntary abandonment. Where the homestead is conveyed, either with or without an express statutory relinquishment, and actual possession is given to the grantee, by the voluntary withdrawal of the husband and wife, the homestead as to such grantee, and persons claiming under him, and in his and their favor, is abandoned, but only as to them. As to third persons, the homestead right cannot with any propriety be said to have been abandoned merely by being transferred. The owner has made such use of it as he deemed most to his advantage in order to procure for his family a more eligible home. But as to the grantee to whom the homestead-owner and his wife have delivered the actual occupancy, under the deed, it is as much an abandonment as if the owner and his family had removed to Europe with the avowed intention of never returning, and had been lost on the outward voyage.

Here, then, we arrive at the true solution of this case. When the plaintiff made his deed it was not void, but remained inoperative until the actual occupancy of the homestead was transferred to the grantee. It then took effect as fully as if it had been executed in conformity with the requirements of the homestead law. Where the naked legal title to the fee was vested, intermediate the delivery of the deed and the delivery of possession of the premises, is a purely metaphysical speculation into which it is bootless to inquire. It is sufficient to say that the homestead was fairly sold, that the possession was voluntarily given up to the grantee, and that these facts create an estoppel *in pais* against both husband and wife which will forever debar them from asserting a homestead right as against their grantee or persons claiming under him. Although a married woman may not be bound by the covenants in her deed, even by way of estoppel, yet in reference to the homestead right she may well be held estopped by her voluntary acts *in pais* as completely as if she were *feme sole*,—at least, to the extent of preventing the commission of a fraud.

Judgment affirmed.

CONVEYANCE OF HOMESTEAD AND NECESSITY OF RELEASE BY WIFE: See *Best v. Allen*, 81 Am. Dec. 338; *Sharp v. Bailey*, 81 Id. 489, and cases cited. It is held that an express relinquishment of the homestead right by the wife is necessary, under the Illinois statute, to vest title in a vendee of the husband and wife, in every instance except where, after the conveyance, the family remove from the property and abandon the possession to the purchaser: *Redfern v. Redfern*, 38 Ill. 511; *McDonald v. Orndall*, 43 Id. 287; *Vasey v. Board of Trustees*, 59 Id. 192; *Shepard v. Brewer*, 65 Id. 386;

Hartwell v. McDonald, 69 Ill. 298; *Stevens v. Hollinsworth*, 74 Id. 211, all citing the principal case. Continual occupancy is necessary to preservation of the homestead: *Walters v. People*, 65 Am. Dec. 730. As to the effect of removal from the homestead as an abandonment thereof, see *Taylor v. Hargous*, 60 Id. 613, note.

ALTES v. HINCKLER.

[36 ILLINOIS, 265.]

ERROR OF SHERIFF IN NEGLECTING TO AFFIX SEAL TO DEED OF LAND SOLD FOR TAXES will not be corrected by a court of chancery, tax titles being purely technical as distinguished from meritorious titles, and depending for validity upon strict compliance with the statute.

BILL in equity. The opinion states the facts.

H. K. S. O'Melveny, for the plaintiff in error.

W. H. Underwood, for the defendants in error.

By Court, LAWRENCE, J. The only question presented by this record is, whether a court of chancery will interfere to correct an error of the sheriff in neglecting to affix his seal to a deed made by him of land sold for taxes. The power of the court to correct past mistakes of officers, if it exist at all, is one always to be exercised with much circumspection, lest the rights of innocent third persons may be jeopardized, and an application of this particular character presents but slight claims to favor. While we have properly given to our limitation laws a liberal construction, and recognized every species of tax deed, as, in itself, the foundation of an adverse possession, yet this court, at least since its reorganization under the present constitution, has applied to tax sales and deeds, when offered as paramount title, the same rigid rules that have been almost universally adopted by other courts in reference to sales of that description. A tax title, if a title at all, is so *stricti juris*. It is a purely technical, as contradistinguished from a meritorious, title, and depends for its validity upon a strict compliance with the statute. Objections which, in regard to sales of a different character, would be overlooked, are here held valid. And this strictness rests upon a substantial reason, as exemplified in the record before us. The instrument to which we are asked to affix a seal purports to convey one hundred acres of land for a consideration of \$4.70. In comparison with the probable value of the land, this consideration is so grossly inadequate that it can hardly be called

valuable. This same inadequacy pervades all tax sales, and hence the propriety of the rigid rules by which their validity is tested. It would be extraordinary, if, after a title of this kind had been held worthless in a court of law, the holder could turn round and cure its defects by applying to a court of equity. He has no standing in a court of equity,—not because he has done anything at all censurable in purchasing at a tax sale, but because, in making the purchase, he has paid what the court, when asked to decree the title out of the former owner, can hardly regard as a valuable consideration. True, he was under no obligation to pay more, but at the same time, in purchasing at that price, he should understand that he is not in a position to ask anything further from the courts than that they will give him the land upon his showing a sale and deed made in conformity with the requirements of the law. If he fail in this, assuredly a court of chancery will not aid him.

Decree affirmed.

STATUTE MUST BE STRICTLY COMPLIED WITH TO PASS TITLE BY TAX DEED: See *Utica Bank v. Mercereau*, 49 Am. Dec. 189, and note 232, citing cases. In *McCready v. Sexton*, 29 Iowa, 382, the principal case is cited, and it is held that when a tax title is not good at law, a court of equity has no power to aid the purchaser in completing his title.

ALTES v. HINCKLER AND ABBOTT.

[36 ILLINOIS, 275.]

GROWING CROPS ARE PART OF REALTY, as between the successful plaintiff in an action of ejectment and the evicted defendant, and if the former is put in possession under his writ, and the latter nevertheless enters and carries away the crops, the plaintiff may maintain trover for their value; but the judgment cannot be for more than the *ad damnum*.

TROVER. The opinion states the facts.

H. K. S. O'Melveny, for the plaintiff in error.

W. H. Underwood, for the defendants in error.

By Court, LAWRENCE, J. At the May term, 1863, of the Monroe circuit court, Hinckler and Abbott recovered a judgment in an action of ejectment against Altes, on which a writ of possession was at once sued out, and Hinckler and Abbott were put in possession of the premises. At the time a crop of wheat and barley was growing upon the land, having been

sown during the pendency of the ejectment. Notwithstanding the execution of the writ of possession, Altes afterwards entered and cut the crop, and carried it away. Thereupon Hinckler and Abbott brought an action of trover against him, and recovered a verdict and judgment for the value of the crop. To reverse this judgment Altes has brought up the record.

It is urged upon the part of the plaintiff in error that growing crops are personal property. For some purposes, and as between some parties, they are so, but as between the successful plaintiff in an action of ejectment and the evicted defendant, they are unquestionably a part of the realty: Adams on Ejectment, 347; *Upton v. Witherwick*, 3 Bing. 11; S. C., 11 Eng. Com. L. 160; *Strode v. Swim*, 1 A. K. Marsh. 366; *Brothers v. Hurdle*, 10 Ired. 490 [51 Am. Dec. 400].

The same principle is also settled in *Crotty v. Collins*, 13 Ill. 567.

Apart from authority, it is quite clear as a matter of principle. If the defendant in the ejectment was entitled to the crops of the year 1863, when the recovery was had, on what ground could he be held liable for the mesne profits of 1862, and of the preceding years? To hold him liable for the profits of the land one year, and permit him to enter in order to secure them the next, would be absurd. Besides, the writ of possession, as given by the statute, commands the sheriff to give the plaintiff possession of the land and its appurtenances. When this writ is executed, he is in under his paramount title, with rights as complete as if he had never been ousted. He can, if he desire, plow up whatever growing crops he may find upon his fields, and a re-entry by the former occupant is as much a trespass as would be a similar entry by a stranger. The court below decided correctly in holding the plaintiff in error responsible for the value of the crops carried away by him.

The *ad damnum* in the declaration was for only five dollars. The judgment was for \$375. For this we are obliged to reverse the judgment, and remand the cause, with leave to amend declaration.

Judgment reversed.

GROWING CROPS, WHETHER AND WHEN CONSIDERED AS PART OF REALTY:
See note to *Norris v. Watson*, 51 Am. Dec. 160; and see *Backenstoss v. Stahler*,
75 Id. 592.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
INDIANA.

**THAYER v. ST. LOUIS, ALTON, AND TERRA HAUTE
RAILROAD COMPANY.**

[22 INDIANA, 26.]

UNDER INDIANA STATUTE, RAILROAD COMPANY IS LIABLE, IRRESPECTIVE OF NEGLIGENCE, for injuries to animals, but not to persons, where the road might be but is not fenced; but where the proper fence is maintained, it is not answerable for animals injured, except as at common law, where there is negligence on its part, and the negligence of the owner of the stock does not contribute to its immediate injury.

RAILROAD COMPANIES ARE LIABLE, AS COMMON CARRIERS, FOR GOODS LOST OR INJURED, but they may by special contract limit this liability.

RAILROAD COMPANIES ARE LIABLE FOR INJURIES TO PERSONS NOT PASSENGERS, where the injuries arise from negligence on their part, to which injuries the negligence of the injured party does not immediately contribute.

RAILROAD COMPANIES MAY BE LIABLE FOR WANTON INJURIES TO PERSONS NOT PASSENGERS, even though there be negligence on the part of the injured party.

RAILROAD COMPANIES ARE LIABLE AS PUBLIC CARRIERS OF PASSENGERS FOR INJURIES RESULTING FROM NEGLECT to use the utmost care of cautious persons, unless that liability is restricted by special contract.

RAILROAD COMPANY IS NOT LIABLE TO ONE EMPLOYEE FOR INJURIES OCCASIONED BY ANOTHER, where both are engaged in the same undertaking; and it makes no difference that the injury is the result of negligence of an employee of higher authority, to whom the injured employee is subject, and from the consequences of whose negligence he cannot guard.

RAILROAD COMPANY IS LIABLE TO EMPLOYEE FOR INJURIES HAPPENING TO HIM from its negligence in employing incompetent persons in the management of the road and trains, or unsafe machinery in the running of them, or using the road when defective, if the injuries actually happen from such causes, and the employee injured has not the same means of knowledge of the existence of such causes as the employer.

ACTION against a railroad company for damages for personal injuries.

J. A. Pierce, J. M. Allen, and J. T. Scott, for the appellant.

Smith and Meek, for the appellee.

By Court, PERKINS, J. Alfred Thayer brought an action against the St. Louis, Alton, and Terre Haute Railroad Company, alleging as his ground of complaint that he was a brakeman upon a freight train owned and run by the company, and that, while acting for the company, he fell through a culvert and received great bodily injury, under the following circumstances, viz.: At a point on the road there is a culvert which is now, and has been since the road was constructed, uncovered, but of what dimensions the culvert may be is not stated. Near that culvert a switch branches from the road, "over which it frequently becomes necessary for the employees, in charge of trains, to pass while switching the company's cars from the main to the side track." On the passing of a given freight train the conductor ordered said Thayer to detach the cars from the engine in order to run them on the switch, and in obeying said order, without fault on his part, he fell into the culvert.

Thayer claims that the company is guilty of negligence in building and continuing an open culvert; and is liable to him for the injury he received, notwithstanding he entered into the service of the company with knowledge of the state of the culvert, because the conductor ordered him to detach the cars.

The court below held the railroad company not liable, under the circumstances.

As a mode of reaching the decision of this cause it may be well to state the principles of railroad law established in Indiana, and then to ascertain whether the case at bar falls within any one of them.

1. By statute, in this state, railroad companies are liable for animals, but not persons, injured upon their roads, where they might be but are not fenced, irrespective of the question of negligence: *Toledo & W. R. R. Co. v. Thomas*, 18 Ind. 215.

2. Where a proper fence is maintained, and in places where it is not required to be, the companies are not liable for animals injured, except as at common law, where there is negligence on their part, and the negligence of the owner of the stock does not contribute to its immediate injury: *Toledo & W. R. R. Co. v. Thomas*, *supra*.

3. Railroad companies are liable, as common carriers, for goods lost or injured: See the cases in Davis's Dig., tit. Carriers. But by special contract, they may limit this liability: *Indiana Central R'y Co. v. Mundy*, 21 Ind. 48.

4. Railroad companies are liable for injuries done to persons not passengers where the injuries arise from negligence on the part of the companies, to which injuries the negligence of the injured parties does not immediately contribute; and this may include wanton injuries by the companies where there may be negligence on the part of the injured party: *Evansville etc. Co. v. Hiatt*, 17 Ind. 102, and cases there cited.

5. Railroad companies are liable as public carriers of passengers for injuries resulting from neglect to use the utmost care of cautious persons: *Gillenwater v. Madison & I. R. R. Co.*, 5 Ind. 339 [61 Am. Dec. 101]; unless that liability is restricted by special contract: *Indiana Central R'y Co. v. Mundy*, 21 Ind. 48. As to who is a passenger, see *Fitzpatrick v. New Albany & S. R. R. Co.*, 7 Id. 436.

6. Railroad companies are not liable to one employee for injuries occasioned by another, where both are engaged in the same undertaking: *Wilson v. Madison etc. R. R. Co.*, 18 Ind. 226; nor does it make any difference that the injury, in the given case, happens to one employee by the negligence of an employee of higher authority, to whom the injured employee is subject, and from the consequence of whose negligence he cannot guard: Id. And see also, in point, *Sherman v. Rochester & S. R. R. Co.*, 17 N. Y. 153. As against the public, but not as between fellow-servants, railroad companies are liable for the negligence of servants in their business.

7. But railroad companies may be liable to employees for injuries happening to them through the negligence of the railroad company; which negligence may consist in the employment of incompetent persons in the management of the road and trains, or of unsafe machinery in the running of them, or using the road when defective, etc., if the injuries actually happen from such causes, and the employees injured have not the same means of knowledge of the existence of such causes as the employer: *Indianapolis & C. R. R. Co. v. Love*, 10 Ind. 554; *Indianapolis & C. R. R. Co. v. Klein*, 11 Id. 38. See also, in point, *Wright v. New York Cent. R'y Co.*, 25 N. Y. 562. On these points, railroad companies are subject to the general law governing master and servant.

We may now properly ascertain whether the case at bar falls within any of the foregoing principles.

How, then, came the plaintiff in this suit to be injured? Was it through the negligence of the company in suffering a culvert to remain uncovered? If this act constituted negligence, a point we do not decide, the condition of the culvert was as well known to the plaintiff as to the company, and it does not appear that he had objected to serving the company on account of that condition, nor on account of the fact that his customary duty required him to couple cars near to it.

Was it the negligence of the company that the conductor directed the detaching of cars at that place? It was not. The direction was not given at that time pursuant to any special order of the company. The direction was given by the conductor in the discharge of his general duties, and by virtue of his general powers as conductor. He did not assume to direct the manner of executing the act. And if, after he had ordered the cars detached, he did not slacken the speed of the train, or place it in position, as he ought to have done, so that the act of uncoupling could be safely performed, then the injury to the plaintiff happened through the carelessness of a co-employee of higher authority, and does not differ from *Wilson v. Madison etc. R. R. Co.*, 18 Ind. 226.

The judgment below is affirmed, with costs.

LIABILITY OF RAILROADS FOR INJURIES TO ANIMALS, and duty to fence: See *Totten v. Cole*, 82 Am. Dec. 157; *Central O. R. R. Co. v. Lawrence*, 82 Id. 434, and cases in notes. The principal case is cited in *Toledo W. & W. R. R. Co. v. Weaver*, 34 Ill. 299, to the point that, in the absence of statute requiring railroads to fence, and making them liable at all events, negligence must be averred and proved.

LIABILITY OF RAILROAD TO ONE NEITHER PASSENGER NOR EMPLOYEE for injury: See the cases cited in the note to *Norton v. Western R. R. Corp.*, 69 Am. Dec. 628. In *St. Louis etc. R'y Co. v. Mathias*, 50 Ind. 84, the principal case is cited to the point that a railroad will only be liable in such cases for injuries of which their negligence was the proximate cause.

COMMON CARRIER IS LIABLE AS INSURER OF SAFETY OF PASSENGER: See *Arnold v. Jones*, 82 Am. Dec. 617, and note; and see the principal case cited to this effect in *Sherlock v. Alling*, 44 Ind. 201.

POWER OF COMMON CARRIER TO LIMIT LIABILITY FOR INJURIES RESULTING FROM NEGLIGENCE BY SPECIAL CONTRACT: See *Bissell v. N. Y. Central R. R. Co.*, 82 Am. Dec. 369, and *Perkins v. N. Y. Cent. R. R. Co.*, 82 Id. 281, and notes, as to passengers; and *Thomas v. Ship Morning Glory*, 71 Id. 509, and *Steele v. Townsend*, 79 Id. 49, as to carriers of goods. The ruling, in the principal case, that carriers could so limit their liability, is directly overruled in *Ohio & M. R'y Co. v. Selby*, 47 Ind. 471, 482.

MASTER IS NOT LIABLE TO SERVANT FOR INJURY RESULTING FROM NEGLIGENCE OF FELLOW-SERVANT in same general occupation: *Sullivan v. Toledo*

etc. *Ry Co.*, 58 Ind. 28, citing the principal case; even though the negligent employee was higher in authority and grade of employment than the one injured: *O'Connell v. Baltimore & O. R. R. Co.*, 83 Am. Dec. 549, and note; unless the master has failed to exercise proper care in securing a competent servant: *Ohio & M. Ry Co. v. Collarn*, 73 Ind. 269, citing the principal case.

CITY OF AURORA v. WEST.

[22 INDIANA, 88.]

BONDS AND COUPONS ISSUED IN PAYMENT OF SUBSCRIPTION OF MUNICIPAL CORPORATION to capital stock of a railroad company, in the form set out in this case, are legal promissory notes, and are governed by the law merchant.

NEGOTIABLE INSTRUMENTS ARE GOVERNED BY LAW OF PLACE where they are expressly made payable.

MERCANTILE PAPER MADE VOID AB INITIO BY STATUTE is void in the hands of a *bona fide* holder.

MUNICIPAL CORPORATION CANNOT, WITHOUT SPECIAL AUTHORITY, SUBSCRIBE FOR STOCK IN RAILROAD CORPORATION, and issue bonds in payment thereof; but such authority may be conferred by statute whenever it is expedient; and when so given in any case, it must be executed as prescribed in the grant, if executed at all; and the terms of the grant cannot be legally departed from or exceeded.

PERSONS DEALING WITH BONDS ISSUED BY MUNICIPAL CORPORATION IN AID OF RAILROAD, which bear on their face a reference to the authority under which they are issued, are bound to take notice of the extent of the powers of the agent who issued them.

RAILROAD RUNNING THROUGH CITY RUNS TO SUCH CITY, WITHIN MEANING OF STATUTE authorizing a subscription by the city in aid of the railroad in case it runs to it.

IF CITY IS AUTHORIZED TO SUBSCRIBE STOCK IN AID OF RAILROAD WHICH SHALL RUN TO IT, and such city is not made one of the points of the road in the charter, no absolute subscription of stock in such corporation can be made by such city until action had been had to bring the railroad to such city.

RAILROAD CORPORATION, AS WELL AS ITS DIRECTORS, IS CHARGEABLE WITH NOTICE of the time, place, and manner of the location of its road.

CAUSE WILL NOT BE REVERSED ON APPEAL FOR ERROR IN PERMITTING QUESTION TO BE PUT AND ANSWERED, where the answer is harmless; nor where, though not harmless, no motion for a new trial, on account of the error, was interposed.

ACTION to recover amount due on coupons attached to municipal bonds. The opinion states the facts.

Holman and Haynes, Jeremiah Sullivan, and T. D. Lincoln,
for the appellants.

A. Brower, for the appellees.

By Court, PERKINS, J. This suit was brought in the court below by West and Torrence, to recover the amount due on the

coupons falling due in 1858, 1859, 1860, 1861, attached to fifty bonds of one thousand dollars each, issued by the city of Aurora in payment of the stock of the Ohio and Mississippi Railroad Company, which the mayor of the city had subscribed. The bonds bear date the first day of January, 1852, but they were not actually issued till about the 1st of June, 1853, some eighteen months after they bear date.

The following is a copy of one of the bonds and one of the coupons:—

No. 1. UNITED STATES OF AMERICA. No. 1.

STATE OF INDIANA, \$1,000. CITY OF AURORA, \$1,000.

Ohio and Mississippi Railroad Company.

The city of Aurora acknowledges itself indebted to the Ohio and Mississippi Railroad Company, or bearer, in the sum of one thousand dollars, negotiable and payable at the North River Bank, in the city of New York, twenty-five years from date hereof, upon the presentation and delivery of this certificate, bearing an interest of six per cent per annum, payable annually on the first day of January, at said bank, in the city of New York, upon presentation and delivery of the proper coupon hereto attached, signed by the clerk of said city; and at all times the holder shall have a lien on the stock of said city in said company, for which this is received in payment, and may exchange the same for a like amount of said stock at any time before the first declaration of cash dividends, and be substituted as stockholder in place of said city, upon surrender of this bond. This bond is issued in part payment of a subscription of fifty thousand dollars by the said city of Aurora to the capital stock of the Ohio and Mississippi Railroad Company, by order of the common council of the city of Aurora, on the 28th of September, 1850, in pursuance of the eighteenth section of an act granting to the citizens of the town of Aurora, in the county of Dearborn, a city charter, passed by the general assembly of the state of Indiana, and approved February 14, 1848.

Witness the seal of said city of Aurora, and the signature of the mayor and clerk of said city, this first day of January, 1852.

[SEAL.]

SOLOMON P. TUMEY,
Mayor of the City of Aurora, Indiana.
WILLIAM W. CONWAY,
Clerk of the City of Aurora, Indiana.

The following is a copy of one of the coupons:—

No. 1. OHIO AND MISSISSIPPI RAILROAD SUBSCRIPTION. \$50,000.

City of Aurora, Indiana, will pay the bearer sixty dollars, at the North River Bank, in the city of New York, on the first day of January, 1858, being annual interest on bond No. 1.

\$60.

WILL. W. CONWAY, Clerk.

These bonds purport to be issued under the eighteenth section of the city charter of the city of Aurora.

That section is in these words:—

“The said city council, whenever a majority of the qualified voters of said city require it, shall have power, and they are hereby authorized, to take stock in any chartered company for making roads to said city, or for watering or lighting said city; provided that no such stock shall be subscribed on the part of the city until a majority of the qualified voters thereof have signified their assent thereto, by expressing upon their ticket at any annual election, that they are in favor of the subscription for such stock by the city council; and to raise funds for the payment of such stock, the said city council shall have power and authority to make and sell their bonds, under the seal of said corporation, payable in such time as they may deem proper and expedient, and bearing interest at the rate of six per cent per annum, payable annually, and therein pledge to the holder of such bonds that the stock so taken, with all the dividends thereon accruing, shall be held and firmly bound for the payment of said bonds and accruing interest on the same, and that the interest coupons attached to said bonds shall be received at all times when due, for the payment of all taxes due to said city; the amount of stock subscribed in any one chartered company not to exceed fifty thousand dollars.”

The city officers having subscribed for fifty thousand dollars of the capital stock of the company in September, 1850, they did, in June, 1853, issue these bonds. They were not sold in the market or in any way to raise money for the payment of the stock, but they were, on or about the third day of June, delivered by the city officers to the Ohio and Mississippi Railroad Company, in payment of the subscription. The stock was not issued to the city until long afterwards. It was, when issued, in such form that it was afterwards returned to the Ohio and Mississippi Railroad Company, and canceled, and no stock has since been issued to the city.

Among the grounds of defense relied on by the city of Aurora was this: “That the Ohio and Mississippi Railroad

Company was not a chartered company for making a road, or roads, to said city of Aurora, or for doing any other act or thing touching said city, or for the promotion of the local interest thereof; and the said defendants and the city of Aurora aforesaid specially aver that on the — day of September, 1850, when the said subscription was made by the said city council of the city of Aurora for fifty thousand dollars of the capital stock of said Ohio and Mississippi Railroad Company, the road of said company, that is to say, the Ohio and Mississippi Railroad, was not located to or through said city, and the said Ohio and Mississippi Railroad Company was not, on the — day of September, 1850, the day upon which said subscription was made, constructing, nor had said company at any time before that day been engaged in the construction of, a railroad, or any other road to, or through, or from, the said city of Aurora, nor was the said company required by their act of incorporation to construct a road to, through, or from said city”; all of which was well known to Charles W. West, one of the plaintiffs, who was then, had been before, and continued afterwards to be, a member of the board of directors of said Ohio and Mississippi Railroad Company.

On the trial, the court charged the jury, among other things, as follows: —

“If you believe from the evidence that the plaintiffs purchased the bonds from the railroad company in good faith, and paid a valuable consideration, and without any knowledge on their part of the city of Aurora having any objections to the payment of said bonds, or having objections to the manner in which the city of Aurora made said bonds, you should find for the plaintiff.”

This was excepted to.

It appeared in evidence that the plaintiff, West, was a director and active member of the corporation, as alleged in the paragraph of the answer above quoted.

There was judgment below against the city. In examining the case, we may first properly ascertain the character of these corporation bonds.

They are, in legal effect, the promissory notes of the city. It is true, they are under seal, and would not, by strict common-law rules, come within the definition of promissory notes, but they are now treated as such. If they had been issued payable generally, they might not have been governed by the law merchant in this state. Only bills of exchange, and such notes as are payable at a bank in this state, are by the law of

this state governed by the *lex mercatoria*: *Piatt v. Eads*, 1 Blackf. 81; *Mix v. State Bank*, 13 Ind. 521.

But the bonds or notes in question are payable in New York; they are therefore, as against the maker of them, New York contracts; they are governed by the law of New York.

This principle of law was settled in England, by the case of *Robinson v. Bland*, 1 W. Black. 234, 256, in 1760; S. C., 2 Ver. 1077. In that case, Sir John Bland drew a bill at Paris upon himself, payable in England, for money lost at play in Paris. It was, in legal effect, his promissory note, executed in Paris, but payable in England. Suit was instituted on the bill in England. The question was, whether the law of France or England was to determine the character of the paper. The case was twice argued. On the first argument, Dennison, J., said: "This case and the law upon it are quite new to me. I can form no opinion upon it."

On the second argument, Lord Mansfield said: "The general rule established *ex comitate et jure gentium* is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract. But this rule admits of an exception where the parties (at the time of making the contract) had a view to a different kingdom. Huberus says (Proel. 1, tit. 3, p. 34) contracts are to be considered according to the place wherein they are to be executed. As therefore the bill in the present case is made payable in England, it is entirely an English transaction, and to be governed by the local law. Dennison, J., said: "It is a plain case, and must be ruled by the laws of England." Wilmot, J., said: "The place where the money is to be paid must guide the law. It is determined as to usurious contracts in Ireland: Prec. Ch. 128. Clearly, therefore, the law of England must be the rule, as the money was made payable here." To the same effect in Indiana: *State Bank v. Bowers*, 8 Blackf. 72; *Hunt v. Standart*, 15 Ind. 33; *Ross v. Park Bank*, 20 Id. 94; *Butler v. Myer*, 17 Id. 77.

By the law of New York, bonds like those in suit are governed by the law merchant. This is shown by the statute of New York set out in the record, and the decisions of her courts: *Gould v. Town of Sterling*, 10 Am. Law Reg. 291, and note 2; S. C., 23 N. Y. 439; *Bank of Rome v. Village of Rome*, 19 Id. 20 [75 Am. Dec. 272]; see *Teter v. Hinders*, 19 Ind. 93.

Being mercantile paper, the next question is, To what defenses is it subject? As a general proposition, it may be

laid down that mercantile paper, made void *ab initio*, by statute, is void in the hands of a *bona fide* holder: Story on Bills, sec. 189. So such paper as a general proposition, we take it, cannot be enforced, even by a *bona fide* holder, against infants, lunatics, married women, and alien enemies, they not having capacity to bind themselves by such contracts: Story on Bills, secs. 81 et seq. So it has been held that where a corporation issued commercial paper not apparently within the scope of its powers, such paper was void in the hands of a *bona fide* holder, if there could be such: *Smead v. Indianapolis P. & C. R. R. Co.*, 11 Ind. 104; *Starin v. Town of Genoa*, 23 N. Y. 450; *Gould v. Town of Sterling*, 23 Id. 459; see also *Biddle Boggs v. Merced Mining Co.*, 14 Cal. 367; *McCracken v. San Francisco*, 16 Id. 626; *Grogan v. San Francisco*, 18 Id. 613; *Zottman v. San Francisco*, 20 Id. 103; see *Moran v. Commissioners of Miami Co.*, 2 Black, 722. But we need not now express an opinion on this point, for the plaintiffs in the case at bar were not, as will appear further on, *bona fide* holders of the bonds in suit; so that, if these bonds were irregularly issued, the plaintiffs were chargeable with notice thereof. Aurora was and is a municipal corporation, and therefore on general principles of law could not, without special authority, subscribe stock and issue bonds in payment of it, in a railroad corporation: Grant on Corporations, pp. 60, 276, side pages. But such authority is proper to be conferred upon a city where it is expedient. And where such special authority is given, by statute, in any case, it must be executed as prescribed in the grant, if executed at all. The terms and conditions of the grant cannot legally be departed from or exceeded. In the case of the city of Aurora, a special authority was given to her, by the section of the charter above quoted, to take stock in a railroad, running to the city, upon a vote of a majority of her qualified voters. The power of the city, then, to take railroad stock, etc., was granted, subject to two conditions precedent, viz.: the existence of a road running to the city, and a vote, expressed, etc., of a majority of her qualified voters. The bonds in suit bore a reference upon their faces to the authority under which they were issued, and thus put all persons on inquiry as to the extent of the powers of the agent issuing them.

Aurora, then, might take a certain amount of stock and issue bonds, etc., to a certain amount, in and for a railroad running to that municipal corporation, after a vote, etc.

A railroad running through would be a railroad running to the city: *City of Aurora v. West*, 9 Ind. 74; *Von Hoxtrup v. City of Madison*, 1 Wall. 291.

That city did, in fact, take stock in the Ohio and Mississippi Railroad Company, and issue bonds in payment of it. Some of those bonds passed into the hands of the plaintiffs below in this suit. And the questions arise, Was the Ohio and Mississippi Railroad Company a railroad running to Aurora? Was the stock taken after a vote, as prescribed by the charter? A determination of the city council that such a vote had been taken would probably be sufficient evidence of that fact, at least, to constitute a *prima facie bona fide* purchaser in a given case: *Evansville etc. R. R. Co. v. Evansville*, 15 Ind. 395. In this case, however, it may be questioned whether the city council ever passed upon the point. A majority of those voting may not be a majority of the votes; but we pass this point, and proceed to the other inquiry above propounded, viz.: Was the Ohio, etc., railroad a road running to Aurora? How is this inquiry to be determined? If Aurora had been made a point in the charter of the company, that fact would have been an answer to the question; but it was not. Hence, it could only have been made a road running to Aurora by subsequent action of the directors of the corporation; and till such action had been had, no absolute subscription of stock in the corporation could have been made by the city. Now, the directors of the Ohio and Mississippi Railroad Company are constituted, by the charter, the corporation; and the fact appears that from its origin till after the subscription by Aurora, West, one of the plaintiffs, and a partner of the other, was one of the acting directors of the Ohio, etc., company, and thus a part of the corporation; and such a corporation must be chargeable with knowledge of its line of road; hence, in point of law, was necessarily chargeable with notice of the time, place, and manner of the location of the road: See *Aspinwall v. Ohio etc. Co.*, 20 Ind. 492.

In view of this fact, then, that the plaintiffs must be charged with notice on the question of location, the instruction given by the court above quoted is erroneous, and may have controlled the verdict in the cause. That instruction is erroneous on two grounds: —

1. It goes upon the hypothesis that the bonds may have been illegally issued, and the plaintiffs *bona fide* holders of them, even though that illegality consisted in issuing the bonds for stock subscribed in a road not running to Aurora.

2. It goes upon the hypothesis that the bonds might have been void for illegality of issue, and that fact known to the plaintiffs, and yet the plaintiffs be entitled to recover, if they did not know that the people of the city were objecting on that ground.

This instruction was calculated to mislead the jury. The people would be presumed to be objecting.

A point is made as to an error of the court in allowing an illegal question to be propounded to a witness. Whether the answer to such question should be excepted to as well as the question, to save the error for review in the supreme court, we do not decide; but we do decide that the supreme court will not reverse for the error of permitting such question to be put and answered, where the answer is harmless; nor where, though not harmless, no motion for a new trial on account of the error was interposed: See *City of Aurora v. Cobb*, 21 Ind. 492.

In the case of *Culbertson v. Stanley*, 6 Blackf. 67, Sullivan, J., says: "Nor is it error that the court erroneously overruled an objection to a leading question, unless the record show that the opposite party was injured by the answer of the witness." See also *Rodman v. Kelly*, 13 Ind. 377: "If the witness did not give the answer it was the design of the plaintiff to draw from him, the defendant has no reason to complain."

The judgment below is reversed, with costs. Cause remanded, etc.

NEGOTIABLE INSTRUMENTS ARE GOVERNED BY LAW OF PLACE WHERE THEY ARE MADE PAYABLE: *Hunt v. Standard*, 77 Am. Dec. 79, and note. The principal case is cited in *Gray v. State*, 72 Ind. 581, on this point.

COUPON BONDS, TRANSFER AND NEGOTIABILITY OF: See *Morris Canal Company v. Fisher*, 64 Am. Dec. 423, and the lengthy note thereto: *Clapp v. Cedar Co.*, 68 Id. 678; *Rome v. Rome*, 75 Id. 272. In *Mount Vernon v. Hovey*, 52 Ind. 567, citing the principal case, it is held that municipal-aid bonds are public securities and are on the same footing as bills of exchange.

CONSTITUTIONALITY OF LAWS CONFERRING ON MUNICIPAL CORPORATIONS POWER TO SUBSCRIBE TO STOCK in aid of railroads: See *Prettyman v. Tase-well*, 71 Am. Dec. 230, and cases in note. On the point that such laws are constitutional, see the principal case cited in *Lafayette etc. R. R. Co. v. Geiger*, 34 Ind. 217; *Stiltz v. Indianapolis*, 55 Id. 524; *Hanson v. Vernon*, 27 Iowa, 81; *Stewart v. Supervisors*, 30 Id. 30. In *State v. Hauser*, 63 Ind. 174, citing the principal case, it is held that municipal corporations cannot, without express legislative authority, subscribe to stock in aid of railroad, and issue bonds therefor.

RECITALS IN MUNICIPAL-AID BONDS, CONCLUSIVENESS OF: See *Clapp v. Cedar Co.*, 68 Am. Dec. 678.

ON CONTRACT BY MUNICIPALITY TO RENDER AID TO RAILROAD in consideration of fact that railroad should be built in a specified manner, a substantial compliance on the part of the railroad is required: *Virginia & T. R. R. Co. v. Lyon Co.*, 6 Nev. 74, citing the principal case.

CAUSE WILL NOT BE REVERSED ON APPEAL for error where no motion for a new trial on account of such error, which consisted of the improper admission of evidence, was interposed: *Smith v. Gillett*, 50 Ill. 299, citing the principal case.

BROWN v. SULLIVAN.

[22 INDIANA, 359.]

PERSON DOES NOT BECOME EXECUTOR DE SON TORT BY DOING MERELY ACTS OF KINDNESS AND CHARITY, touching the property of a deceased person, such as taking care of it, feeding stock, providing for children, and the like; but to constitute him such, his intermeddling with the goods of the deceased must be an illegal intermeddling.

PLAINTIFF IS ENTITLED TO COSTS GENERALLY IN ACTION AGAINST PERSON AS EXECUTOR DE SON TORT, if he recover five dollars or more in damages.

ACTION against defendant to charge him as executor *de son tort*. The opinion states the facts.

Horace Heffren, for the appellant.

John H. Butler, for the appellee.

By Court, PERKINS, J. Elisha Tarr, as administrator of the estate of William Brown, deceased, sued David Sullivan, as executor *de son tort* of said Brown's estate, laying his damages at two hundred dollars. Sullivan answered in two paragraphs:—

1. The general denial.

"2. Said defendant, for further answer to said complaint, says that he took possession of said property at the request of his daughter, who was the widow of said decedent, merely for the purpose of taking care of the same, and that he took proper care thereof, doing it no injury, until letters of administration were taken out on said estate, when he delivered up said property to the plaintiff, the administrator appointed, so soon as he was authorized to receive the same, which is the taking and conversion complained of in the complaint.

"JOHN H. BUTLER, for defendant."

The court overruled a demurrer to this answer. A reply in denial was then filed. Trial, judgment for the plaintiff for less than fifty but more than five dollars. Judgment for costs in favor of the defendant.

It is claimed that the court committed two errors:—

1. In overruling the demurrer to the second paragraph of the answer; 2. In rendering judgment for costs against the plaintiff.

We will notice these two points in their order.

Who, then, is an executor *de son tort*? Our statute declares that,—

“Sec. 15. Every person who shall unlawfully intermeddle with any of the property of a decedent shall be chargeable as an executor of his own wrong, and shall be liable to an action in the court of common pleas, or any other court of competent jurisdiction, by any creditor or other person interested in the estate of the decedent to the extent of the damages occasioned thereby, and shall account for the full value of such property, with ten per centum thereon, and may be examined under oath touching such intermeddling, and testimony thus elicited shall not be thereafter used against him in any prosecution; and such person may also be attached and imprisoned in the discretion of the court, until its orders in the premises are complied with; and no debt due such executor from the decedent shall be deducted from the value of any such property.”: 2 Gavin & Hord, 488.

The intermeddling, then, with the goods of a deceased by a living person, which will constitute such living person an executor *de son tort*, must be an illegal intermeddling. Was the intermeddling set forth in the second paragraph of the answer a legal or illegal one? Fifteen days must elapse, and a greater number may, before an administrator of an estate can be appointed: 2 Gavin & Hord, 485; who is to take care of the estate of the deceased in the mean time? Will the taking care of it constitute a person an executor *de son tort*? Toller says: “But there are many acts which a stranger may perform without incurring the hazard of such an executorship; such as looking up the goods; directing the funeral in a manner suitable to the estate which is left, and defraying the expenses of such funeral himself or out of the deceased’s effects; making an inventory of his property; advancing money to pay his debts or legacies; feeding his cattle; repairing his houses; providing necessaries for his children; for these are offices of kindness and charity”: Toller on Executors, p. 40. Acts of kindness and charity, then, may be performed without subjecting the person to the liability of an executor *de son tort*.

According to the second paragraph of the answer, nothing

beyond such acts was done in this case. We think the ruling on the demurrer was right: See *Reagan v. Long*, 21 Ind. 284.

We think the judgment for cost against the plaintiff was wrong, irrespective of the question whether the common pleas had jurisdiction of the cause by virtue of its character as a probate court. The action sounded *in tort* only was for damages solely, and the plaintiff recovered over five dollars: See 2 Gavin & Hord, p. 227, sec. 398.

The judgment as to costs is reversed, with costs, with instructions to render judgment below against the defendant for costs; the judgment against the defendant is affirmed, subject to correction as to costs as above directed.

The judgment is accordingly reversed as to costs, and affirmed as to the residue.

EXECUTORS DE SON TORT.—The term "*executor de son tort*" has been variously defined, but all the definitions are in effect the same, a substantially common one being that any person is chargeable as an *executor de son tort* (or of his own wrong), who shall officiously intermeddle with the personal property or affairs of a deceased person, or do any other act characteristic of the office of an executor, having received no appointment thereto: 1 Williams on Executors, 296 [257], 7th ed.; Schouler on Executors, sec. 184; *Johnson v. Duncan*, 14 Am. Dec. 404; *Glavens v. Higgins*, 17 Id. 142; *McMorine v. Storey*, 34 Id. 374; *Bailey v. Miller*, 44 Id. 47; *Hubbell v. Fogartie*, 45 Id. 775; *Emery v. Berry*, 61 Id. 622; *Bacon v. Parker*, 12 Conn. 213; *Bennett v. Ives*, 30 Id. 329; *Wilson v. Hudson*, 4 Harr. (Del.) 168; *Wiley v. Truett*, 12 Ga. 588; *Bacon v. Barney*, 38 Id. 264; *Wilson v. Davis*, 37 Ind. 141; *Brown v. Durbin*, 5 J. J. Marsh. 170; *Gentry v. Jones*, 6 Id. 148; *White v. Mann*, 26 Me. 361; *Lee v. Chase*, 58 Id. 435; *Wilbourn v. Wilbourn*, 48 Miss. 38; *Leach v. Pittsburg*, 15 N. H. 137; *Scoville v. Post*, 3 Edw. Ch. 203; *Crinkleton v. Wilson*, 1 Browne (Pa.), 361; *Sturdivant v. Davis*, 9 Ired. 365; *Howell v. Smith*, 2 McCord, 518. This term, it will be seen, is not apt in that persons are designated as executors who interfere with intestate as well as testate estates. In some states, including Arkansas, Kansas, New York, and Texas, the office of *executor de son tort* is not consistent with nor recognised by the laws: See *Rust v. Witherington*, 17 Ark. 129; *Fox v. Van Norman*, 11 Kan. 214; *Feld v. Gibson*, 20 Hun, 274; *Anseley v. Baker*, 65 Am. Dec. 136 (Tex.).

No intermeddling with the lands of the deceased will render a person liable as *executor de son tort*, for any injury to the realty is considered generally as a wrong to the heir or devisee: *King v. Lyman*, 1 Root, 104; *Mitchell v. Lunt*, 4 Mass. 654; *Nass v. Van Swearingen*, 7 Serg. & R. 196.

What Acts Constitute Person Executor de Son Tort.—While the modern rule generally is, that it is only the wrongful or tortious intermeddler without claim or color of title, whom the law charges with the liabilities of an *executor de son tort*, the earlier cases show that very slight circumstances of intermeddling were at first considered enough to constitute a person such executor. Thus in *Gerrett v. Carpenter*, Dyer, 166 b, note, it was held that the milking of cows by the widow of deceased would render her liable. So would an executorship *de son tort* result from the act of taking a bible or bedstead of

the deceased: *Robbin's Case*, Noy, 69; see also Williams on Executors, 297 [258]. In North Carolina, it was lately held that the mere act of taking possession of decedent's goods would render the wrong-doer liable as executor *de son tort* as far as respects creditors: *Currie v. Currie*, 90 N. C. 553; and see *Glenn v. Smith*, 20 Am. Dec. 452.

In *Glenn v. Higgins*, 17 Am. Dec. 742, and *Emery v. Berry*, 61 Id. 622, it is held that to constitute an executorship *de son tort*, there must be acts evincing a claim of right to control or dispose of effects of the deceased without any real authority. There must be a possession, occupation, or disposition of the effects of the decedent: *Baily v. Miller*, 44 Id. 47. Using, or giving away, or selling any of decedent's goods will constitute one an executor *de son tort*: *Read's Case*, 5 Coke. 33 b; *Paget v. Priest*, 2 Term Rep. 97; *Leach v. Pillsbury*, 15 N. H. 139; so will the taking of goods to satisfy one's own debt: *Glenn v. Smith*, 20 Am. Dec. 452; *Hardy v. Thomas*, 57 Id. 152; collecting money due the decedent, and paying his debts therewith: *Glenn v. Higgins*, 17 Id. 742; the taking by the widow of decedent of more apparel than she is entitled to: *Stokes v. Porter*, Dyer, 166 b; or the continuance in possession of her deceased husband's goods, and use of them as her own: *Hawkins v. Johnson*, 4 Blackf. 21. Living in the house, and carrying on the trade of the deceased (a victualler), was held a sufficient intermeddling: *Hooper v. Summerett*, Wight, 16. Where the deceased gave to the person in whose house he died certain of his property, it was held that the donee, by receiving and using it, became an executor *de son tort*: *Gleaton v. Lewis*, 24 Ga. 209. Where a servant or agent of another knowingly meddles with the decedent's property, he will be liable, and if he acted at his principal's direction, both will be held accountable: *Sharland v. Mildon*, 5 Hare, 468; *Turner v. Child*, 17 Am. Dec. 555. One having or taking property of the deceased in his possession, under color of a fraudulent gift or sale from him, is an executor *de son tort*: *Norfleet v. Riddick*, 22 Id. 717; *Tucker v. Williams*, 31 Id. 561; *McMorine v. Storey*, 34 Id. 374; *Hopkins v. Towne*, 39 Id. 497; *Baily v. Miller*, 44 Id. 47; *Simonton v. McLane*, 25 Ala. 353; *Allen v. Kimball*, 15 Mo. 116; *Sturdivant v. Davis*, 9 Ired. 365; but see *post* under the next head. The administrator of a fraudulent assignee is liable as an executor *de son tort* to the creditor of a deceased debtor, by whom the assignment was made: *McMorine v. Storey*, 34 Id. 374. A widow taking and using a horse belonging to her deceased husband, and negligently losing it, thereby constitutes herself an executrix *de son tort*. One who takes a note, good and collectible at the time of the owner's death, and holds it afterwards as executor in his own wrong, and neglects to collect it until the maker becomes insolvent, is liable to the administrator for its amount: *Root v. Geiger*, 97 Mass. 178. A partner meddling with the assets of the partnership after the death of one of the firm is liable to account to the surviving partner, and cannot therefore be regarded as an executor *de son tort* of the deceased partner: *Hunt v. Drane*, 32 Miss. 243.

What Acts will not Constitute One Executor de Son Tort.—Offices merely of kindness or charity are not such an intermeddling as will constitute one an executor *de son tort*: *Emery v. Berry*, 61 Am. Dec. 622; *Anseley v. Baker*, 65 Id. 136. Among such acts has been held that of locking up the goods of the deceased for safe-keeping: *Glenn v. Smith*, 20 Id. 452; for where one happens to be left in charge of a dead person's goods, he may keep them until he can lawfully discharge himself without incurring the responsibilities of such an executorship: *Graves v. Page*, 17 Mo. 91. Especially where such person was the widow of the deceased: *Ward v. Bevil*, 44 Am. Dec. 476, and

her use of it will not impose on her the obligations of such executorship when she has young children dependent upon her, whom she must maintain: *Chandler v. Davidson*, 6 Blackf. 367; *McCoy v. Paine*, 68 Ind. 327; *Crashin v. Baker*, 8 Mo. 437. So an executorship *de son tort* does not arise because one arranges for the funeral of the deceased, and defrays the expenses thereof out of the effects of the deceased, provided the sum devoted to the funeral be not unreasonable, considering the value of the estate: *Camden v. Fletcher*, 4 Mees. & W. 378; *Harrison v. Rowley*, 4 Ves. 216; *Wagner v. Ryan*, 19 Mo. 196; *Bacon v. Parker*, 12 Conn. 212. Legal and proper acts by an executor *de son tort*, in discharging debts which are binding to their full extent upon the estate, may be held good against the proper representative of the estate, especially where done honestly and in good faith: *Parker v. Kett*, 1d. Raym. 661; *Graysbrook v. Fox*, Plowd. 282; *Peters v. Leader*, 47 L. J. Q. B. 573. Paying debts of the deceased with one's own money will not render him liable as an executor *de son tort*: *Carter v. Robbins*, 8 Rich. 29. One having colorable authority to hold, take, or deal with the property of the decedent, does not, by so doing, become an executor *de son tort*: See the note to *Turner v. Child*, 17 Am. Dec. 555, reviewing the cases on this point; and see *Johnston v. Duncan*, 14 Id. 54; *Ward v. Bevil*, 44 Id. 478; *Densler v. Edwards*, 5 Ala. 31; *Claussen v. Lafrens*, 4 G. Greene, 224; *Smith v. Porter*, 35 Me. 287. An act for which an agent is liable to the proper representative will not constitute him executor *de son tort*: *Turner v. Child*, 17 Id. 555. Acts done by virtue of an agency which is revoked by death, which revocation, however, is not brought to the notice or knowledge of the agent until after the act, will not constitute an executorship *de son tort*. As where a wife holding her husband's money for the payment of his debts while he was abroad, before receiving knowledge of his death, expends it all for the maintenance of the family: *Brown v. Benight*, 23 Am. Dec. 273; or where an agent, before hearing of his principal's death, collects debts in the course of business for the principal: *Turner v. Child*, 17 Id. 555. An agent is not liable as an executor *de son tort* where, after death of the principal, he pays an order drawn on him for funds in his hands, where such order amounted to a specific appropriation of the funds in his hands to the demand: *Debesse v. Napier*, 10 Id. 658. A subagent becomes an executor *de son tort* if he continues to act after the principal's death, and after notice from the agent that by reason thereof the agency is at an end: *Turner v. Child*, 17 Id. 555; but not merely because he is such subagent, dealing with the property of the deceased at the instruction of his principal: *Givens v. Higgins*, 17 Id. 742. Thus, one taking possession of property merely to care for it, at the request of the widow, is not an executor *de son tort*: *Leach v. Prebster*, 35 Ind. 418; nor where he sells perishable property, if he account for the sale: *Perkins v. Ladd*, 114 Mass. 423; S. C., 19 Am. Rep. 574, both citing the principal case. A voluntary conveyance of property during the donor's lifetime to one who in turn transfers it, cannot be made the basis of a suit against the transferee as executor *de son tort*: *Morrill v. Morrill*, 13 Me. 415; nor can transfers by way of security, which are unimpeachable as in fraud of creditors: *O'Reilly v. Hendricks*, 2 Smedes & M. 388; *Garner v. Lyles*, 35 Miss. 176.

It has been held that one becomes an executor *de son tort* by taking out letters under a void or voidable grant, his liability then being that of an officer *de facto*: *Bradley v. Commonwealth*, 31 Pa. St. 522; *Danforth v. Klock*, 29 Mich. 290; and see *Williams v. Kiernan*, 25 Hun, 355.

Liability of Executor de Son Tort, Generally.—The effect of becoming an executor *de son tort* is to render the party liable to an action by the rightful executor or administrator, or even by a creditor or legatee of the deceased:

Elder v. Littler, 15 Iowa, 65; *Screven v. Bostwick*, 16 Am. Dec. 664; *Collier v. Jones*, 86 Ind. 342; *Hansford v. Elliot*, 9 Leigh, 79; but he cannot be cited to account before the probate court: *Power's Estate*, 14 Phila. 289; *Peeble's Appeal*, 15 Serg. & R. 41; *Stockton v. Wilson*, 3 Penr. & W. 129. In *Farley v. Farley*, 1 McCord Ch. 506, it is said that a proceeding against an executor *de son tort* in equity will not be recognized, except where there is no remedy at law, though in *Screven v. Bostwick*, 16 Am. Dec. 664, it is held that an executor *de son tort* is liable both in equity and at law at one time.

In an action by the creditor, the common-law practice was that the defendant should be sued as executor, on the theory, though it be a fiction, that the creditor had been led to believe the deceased had made a will which had not yet been proved, and that the defendant was the named executor: *Coulter's Case*, 5 Coke, 31 a; *Prince v. Rowson*, 1 Mod. 208; *Brown v. Durbin*, 5 J. J. Marsh. 170; *Buckminster v. Ingham*, Brayt. 116; *Pleasants v. Glasscock*, 1 Smedes & M. Ch. 17; *Gregory v. Forrester*, 1 McCord Ch. 318; *Stockton v. Wilson*, 3 Pa. 129; or as was said in *Anseley v. Baker*, 65 Am. Dec. 137, that this might be regarded as *indicia* that the party interfering was the representative of the deceased. Upon this fiction the pleadings were conducted in most of the older cases, and if the person sued pleaded *ne unques executor*, on proof of the acts constituting him executor *de son tort*, judgment would be given against him, and he would be liable for the debt *de bonis propriis*, the same as any other executor: *Campbell v. Booth*, 7 Cow. 64; *Hubbell v. Fogartie*, 45 Am. Dec. 775; *Peters v. Breckenridge*, 2 Cranch C. C. 518; *Robbin's Case*, Noy, 69; while if he alleged *plens administravit*, he was chargeable only for assets which had come to his hands, and might relieve himself by showing payments to other creditors or to the rightful administrator or executor: *Hooper v. Summersett*, Wightw. 21; *Ayre v. Ayre*, 1 Ch. Cas. Ch. 33. And *and see Glenn v. Smith*, 20 Am. Dec. 452; *Bailey v. Miller*, 44 Id. 47; *Morrison v. Smith*, Busb. 399.

While the above principles are recognized in the early American cases, modern legislation has done considerable toward reducing the early liability of executors *de son tort*, so that it is now held if they are liable to actions by creditors and others than the true executor or administrator at all, it is only for the property taken, and to the extent of the actual damage: *McKenzie v. P'endleton*, 1 Bush. 164; *McConnell v. McConnell*, 94 Ill. 295; *Elder v. Littler*, 15 Iowa, 65; *Mitchell v. Lunt*, 4 Mass. 654; *Hill v. Henderson*, 13 Smedes & M. 688; *Leach v. House*, 1 Bailey, 42; *Kinard v. Young*, 2 Rich. Eq. 247; *Cook v. Sanders*, 15 Rich. L. 63. The action by the rightful administrator or executor is usually in tort as for a conversion of the property: *Mansell v. Briggs*, 17 Vt. 176; but if the act resulted in a benefit, as in selling to advantage, the administrator or executor may waive the tort and sue in *assumpsit* for the proceeds: *Upchurch v. Noworthy*, 15 Ala. 705. In an action against an executor *de son tort*, it is held that if the estate with which he has intermeddled is insolvent, it is no defense that he has paid debts, even to double the amount by him received: *Neal v. Baker*, 2 N. H. 477.

An executor *de son tort* may prove claims against the estate for sums paid out by him while acting in that capacity, and may demand payment ratably with other creditors: *Hardy v. Thomas*, 57 Am. Dec. 152. He may, when sued, show in mitigation of damages, payments made by him, of debts of the estate, which the lawful executor or administrator would have been bound to make: *Reagan v. Long*, 21 Ind. 264; *Tobey v. Miller*, 54 Me. 480; *Saam v. Saam*, 4 Watts, 432. But *see Glenn v. Smith*, 20 Am. Dec. 452. It must however, appear, if he makes such defense, that he has applied the assets as

they could lawfully have been applied by the rightful executor, and if it appear that he has paid debts not entitled to preference, leaving preferred claims unpaid, he will be liable to other creditors: *Gay v. Lemle*, 32 Miss. 309. When sued in trover, it has been held that he cannot show, in mitigation of damages, payment of debts to the value of goods still in his possession, nor be permitted to retain them in satisfaction of his own debt: *Hardy v. Thomas*, 57 Am. Dec. 152; *Glenn v. Smith*, 20 Id. 452; but see *contra*: *Dorset v. Finch*, 25 Ga. 537; *Weeks v. Gibbs*, 9 Mass. 74.

An executor *de son tort* can give to a third person no legal control of the property of the deceased: *Wyllie v. King*, Ga. Dec. pt. 2, 7. Thus a purchase from an executor *de son tort* confers no better title than the vendor had: *Carpenter v. Going*, 20 Ala. 587; but it is held that the purchaser in good faith acquires a possession, or right of possession, which he may defend against every one but the proper representatives of the decedent, and of which he can be deprived only by suit: *Woolfork v. Sullivan*, 56 Am. Dec. 305. It has been held that a purchaser could defend by showing part payment to the regular administrator, and the giving of a note for the balance: *Rockwell v. Young*, 60 Md. 563.

An infant cannot be held liable as an executor *de son tort*: *Bailey v. Miller*, 44 Am. Dec. 47. Where a married woman wrongfully disposed of the effects of deceased, it was held that the administrator had a joint action against both the woman and her husband: *Shaw v. Halkhan*, 46 Vt. 389; S. C., 14 Am. Rep. 628.

Liability of Executor or Administrator for his Own Acts before Qualifying.—Executors will not generally be liable as executors *de son tort* for acts done prior to probate, or appointment by the probate court, it being generally held, both in England and the United States, that the appointment as executor relates back and ratifies his prior and otherwise valid acts: *Wooley v. Clark*, 5 Barn. & Ald. 745; *Whitehead v. Taylor*, 10 Ad. & E. 210; *Bellinger v. Ford*, 21 Barb. 311; *Brown v. Leavitt*, 28 N. H. 493; *Stockton v. Wilson*, 3 Pa. St. 130; *Johns v. Johns*, 1 McCord, 132; and so it is held that on the grant of letters an administrator's authority will relate back so as to ratify acts which would have been valid had he been the rightful administrator: *Emery v. Berry*, 61 Am. Dec. 622; *Shillaber v. Wyman*, 15 Mass. 322; *Alword v. Marsh*, 12 Allen, 603; *Magner v. Ryan*, 19 Mo. 196; *Andrew v. Gallison*, 19 Id. 325; *Bellinger v. Ford*, 21 Barb. 311; *Priest v. Watkins*, 2 Hill, 225; *Rattoon v. Overacker*, 8 Johns. 126; *Outlaw v. Farmer*, 71 N. C. 35; although it has been held that taking administration subsequent to suit is no defense thereto: *Green v. Davis*, 1 Root, 183. It is no defense to an action by a creditor that since the commencement of the action a regular executor has been appointed, if it does not appear that the executor *de son tort* has delivered the assets to the executor, or has expended them in paying debts. It has been held to be no objection to his appointment and qualification as executor and administrator that he is an executor *de son tort*: *Bingham v. Orenshaw*, 34 Ala. 683; *Carnochan v. Abrahams*, T. U. P. Charlt. 196. But a person cannot, merely because he has intermeddled, be compelled to take out letters of administration: *Ackerley v. Oldham*, 1 Phillim. 248. Intermeddling after will is proved, or administration granted, will not render the wrong-doer liable as an executor *de son tort*: *McMorine v. Storey*, 34 Am. Dec. 374.

CULBERTSON v. MILHOLLIN.

[22 INDIANA, 322.]

COURT WILL PRESUME THAT OFFICER HAS PERFORMED HIS DUTY. — So held when the record is silent as to whether a constable gave due notice of a sale, by advertising it as required, or not.

FAILURE OF JUSTICE ISSUING SECOND EXECUTION TO APPEND COPY OF RETURN TO FIRST EXECUTION, which had been returned unsatisfied by reason of failure of sale after levy, for want of bidders, will not render the second execution void, but only voidable, and it might be set aside on motion before the justice; but if no such motion was made, all acts done under it will be valid.

REPLEVIN. The opinion states the facts.

Walter March, for the appellant.

C. E. Shipley and A. Kilgore, for the appellee.

By Court, DAVISON, J. This was replevin by the appellee, who was the plaintiff, against Culbertson, commenced before a justice of the peace, for the recovery of a dun colt. The plaintiff claimed title under a constable's sale, by virtue of an execution issued upon a judgment, in which he was plaintiff and Culbertson was defendant. The justice gave judgment in favor of the plaintiff for twenty-five dollars, and the defendant appealed.

In the common pleas, the issues were tried by the court, who found for the plaintiff thirty dollars. Motion for a new trial overruled, and judgment.

The evidence shows that Milhollin, the present plaintiff, on January 23, 1860, recovered a judgment against Culbertson before a justice of the peace, for \$3.88, and that on the 3d of July then next following, an execution was thereon issued, upon which the constable, on the 1st of January, 1861, made a return as follows:—

“This writ came to hand July 3, 1860. By virtue of said writ, I levied on one shovel plow and one cane-mill, and offered the same for sale on July 14, 1860, and there was no sale for want of bidders. Service, 25 cents; mileage, 70 cents; advertising, 30 cents; return, 10 cents; the whole, 1 dollar and 85 cents.

HENSON LINES, Constable.”

After this, on January 4, 1861, another execution was issued on said judgment, upon which the constable made the following return:—

“This writ came to hand January 17, 1861. By virtue of this writ, I levied on one dun colt. Advertised for sale

February 1, 1861; offered for sale February 11, 1861, and sold to Nathan Milhollin for 9 dollars and 60 cents.

"HENSON LINES, Constable."

The evidence further shows that the plaintiff, upon the service of the first execution, gave up the plow and cane-mill to the constable, who levied on, advertised, and offered the same for sale; and there being no sale, for want of bidders, he left the property on the premises of the defendant, where it has remained near his residence ever since. It also appears that when the colt was levied on, the defendant was absent from home, and that at the time of the last levy the plow and cane-mill were both on the defendant's premises, of which the constable was notified.

The appellant contends that, there being in the record no evidence that the requisite notice of the sale of the property was given by the constable, the sale was invalid. This position is untenable. The record being silent as to whether the constable did or not advertise the sale, he will be presumed to have done his duty: *Mercer v. Doe*, 6 Ind. 80.

Again, it is insisted that the second execution,—the justice having failed to append to it a copy of the return made on the first,—was a nullity. The statute required the justice to append such copy: 2 R. S. (Gavin & Hord), p. 602, sec. 80. But his failure, in this instance, to do so rendered the execution voidable merely, but not void. And being thus voidable might have been set aside on motion before the justice; but no such motion having been made, "all acts done under it are valid": *Doe v. Dutton*, 2 Ind. 309.

Various other points, relative to the rulings of the court, are made by the appellant. These we do not deem it material to notice; because, in looking into the whole record, we are of opinion that the finding and judgment are right on the evidence: 2 R. S. (Gavin & Hord), p. 122, sec. 101.

The judgment is affirmed, with five per cent damages and costs.

OFFICER IS PRESUMED TO HAVE PERFORMED HIS DUTY: *Wood v. Chapin*, 67 Am. Dec. 73, note.

THE PRINCIPAL CASE IS CITED in *State v. Ferry*, 64 Ind. 264, as an authority showing the power of courts over their executions; in *Egbert v. Mercer*, 66 Ind. 310, and *Marts v. Sedam*, 67 Id. 216, to the point that irregularities in executions are available only at the instance of the defendant, and if he waives them by failure to object, the proceedings cannot be collaterally attacked.

PEPPER v. STATE EX REL. HARVEY.

[22 INDIANA, 399.]

IN INDIANA, IN ACTION AGAINST COUNTY TREASURER AND HIS SURETIES to recover money due the state, the auditor, and not the treasurer of state, should be relator.

DRAFT OF OFFICIAL BOND, IN BODY OF WHICH CERTAIN NAMES ARE INSERTED AS OBLIGORS, if afterwards signed by only part of the persons whose names so appear, will not become binding upon them until it is executed by all, on the ground that the presentation of such bond, as prepared, to such persons (named in it) as signed it, amounted to a representation that all the persons named in it would sign it before its delivery.

WHEN DRAFT OF OFFICIAL BOND, IN BODY OF WHICH CERTAIN NAMES ARE INSERTED AS OBLIGORS, is presented to one of such persons for his signature by the principal in the bond, and such person signs it, there being several signatures attached to it already, and it afterwards appears, from some cause, that the bond is not binding on some or any of the persons whose names preceded his, it should be held not binding upon him, unless it be shown that he had knowledge of its invalidity as to the others at the time he signed it.

WHERE DRAFT OF OFFICIAL BOND IS PRESENTED BY PRINCIPAL IN IT TO SEVERAL PERSONS, and their signatures as sureties for him are solicited by him, and he represents to them severally that before its delivery he will procure the signatures of a certain number of other persons as sureties, or of certain named persons, and some of them are induced by such representations to sign it, and others sign it upon condition that such other signatures shall be procured, and such other signatures are not procured, these several classes of persons, in defense to an action upon such bond, may show these facts.

OFFICIAL BOND OF COUNTY TREASURER MUST, IN INDIANA, BE APPROVED AND ACCEPTED by the board of commissioners of the county, and if such board appoints no person as agent to procure its due execution, and on its presentation institutes no examination into the mode of its execution, or the sufficiency thereof, it is reasonable to assume that such board accepted it upon the faith of the fair dealing of the principal in procuring its execution, and thus far at least adopted his acts as their own, and as a substitute for the inquiry they should have instituted on its presentation for their approval.

ACTION against sureties on an official bond. The opinion states the facts.

L. Barbour, J. D. Howland, and Hanna and Quick, for the appellants.

George Holland and C. C. Binkley, for the appellees.

By Court, HANNA, J. The state on relation of Harvey, state treasurer, brought an action on the bond of Batzner, county treasurer of Franklin county, for defalcation. Default as to

Batzner; appearance for the sureties. Demurrer to the complaint for the following reasons:—

1. That the plaintiff has no capacity to sue.
2. Defect of parties plaintiff, in this, that the auditor of state is the only officer having legal capacity to sue.
3. The complaint does not contain facts sufficient to constitute a good cause of action.

These appellants also file a separate demurrer to each of the three paragraphs of the complaint. Demurrer sustained to the first and overruled as to the other paragraphs. Answers by all the defendants separately or together, amounting to *non est factum*. Reply: General denial; trial by the court; finding against all the sureties but one Grinkmier. Motion for a new trial overruled, and judgment on the finding for over twenty-five thousand dollars, and this appeal prosecuted to reverse that judgment.

The reasons for a new trial are:—

1. The court erred in overruling the demurrer to complaint.
2. The judgment is contrary to the evidence.
3. The judgment is contrary to law.
4. The judgment should have been for the defendants below.

The errors assigned are precisely those named in the motion for a new trial. The evidence is set out in a bill of exceptions. All the sureties, or nearly all, were examined under oath as witnesses.

The only questions raised and discussed in this court, are:—

1. Is the suit well brought in the name of the state on relation of the state treasurer?
2. Is the bond binding on the sureties under the circumstances shown in the evidence?

As to the first question, we are of the opinion the suit should have been upon the relation of the auditor of state to recover the funds, as shown here, due the state, for the plain and simple reason that the statute so provides in the "act prescribing the powers and duties of auditor of state."

"Sec. 2. He shall,— . . . 6. Institute and prosecute, in the name of the state, all proper suits for the recovery of any debts, moneys, or property of the state, or for the ascertainment of any right or liability concerning the same.

"7. Direct and superintend the collection of all moneys due to the state, and employ counsel to prosecute suits at his instance, on behalf of the state."

"Sec. 7. Whenever any officer or other person shall render

an account to and make settlement with the auditor, as in this act required, and shall fail to pay over to the treasurer of state the amount to be paid by such officer or person into the state treasury, or to such person as shall be entitled by law to receive the same, within the time prescribed by law, or if no time is prescribed by law, then within the time specified by such auditor, the auditor, upon being notified by said treasurer, or otherwise, of such failure, shall institute suit for the recovery of the amount due and unpaid": 1 R. S. 147, 148.

In this case, it is averred, a settlement with the auditor had been made.

Perhaps it is useless to search for the reasons for the passage of said statutes; but it appears to us that they are so obvious that we will for a moment advert to them. Any mode of auditing, adjusting, settling, and keeping a record of public accounts, and of receiving, keeping, and disbursing the public moneys, was intended to be based upon what is called a system of checks and balances. The auditor of state keeps an office in which settlements and adjustments, etc., are made of claims against and in favor of the state. In that office ought to appear the exact sums in the hands of the treasurer of state belonging to any particular fund. At the time this suit was instituted, no funds could properly get into the state treasury, except upon a certificate of the auditor of state to the treasurer, stating the amount to be paid, and to what fund, and upon a draft by said auditor, in favor of the treasurer upon the person who is to make the payment: Acts 1859, p. 227, sec. 6. Further, it is only in the auditor's office that, in the first instance, a statement of the accounts of county treasurers with the state can be found: 1 R. S., sec. 2, pt. 2, p. 146. It is true, the balance is certified to the treasurer of state. It is not by virtue of that mere balance that the suit is maintained, but upon a copy of the account certified by the auditor. In a word, the auditor superintends the fiscal concerns of the state: *Id.* 147. This he might not be able to do if the treasurer could sue for and collect moneys belonging to the state in his name. We have decided that a county treasurer cannot of his own volition sue his predecessor: *Snyder v. State*, 21 Ind. 77.

As to the second question made, we will notice the evidence bearing upon it.

The evidence of Grinkmier, one of the sureties, was positive that he had not signed the bond nor authorized any other person to place his name to it; that he could not read nor write,

and it was shown that the handwriting was Batzner's. Upon this, the court found that as to said surety the signature was a forgery.

Levi W. Buckingham, one of the sureties, testified that his signature was thus obtained; he asked Batzner if George Berry and Daniel D. Jones were going to sign, and he said they were. He also said that he intended to get a hundred good men on the bond. Buckingham then signed, and was induced to do so by having the assurance of Batzner as to the number and the particular persons he expected to obtain as sureties on the bond. To Auguste Pepper, another appellant, Batzner said he must or would have a hundred names on the bond; and because of this pledge Pepper signed. Was not informed what the paper was for; supposed it was for the character of the man. Walter was assured that Batzner intended, in addition to the persons on his bond for the term then expiring, to get a hundred good men; thinking, in that case, there could not be much danger, he signed also. Schroeder was told by Batzner that he had to have a hundred good men on it, and on these conditions he signed the bond. Henry Berry, knowing that Batzner had promised to get a hundred good men on his bond, asked him if he intended to redeem his pledge. He replied he did so intend, and if necessary he would get two hundred. Berry then told Batzner if he would get one hundred good men on the bond he would sign it. He promised, and Berry signed. Simpson Calfee was promised if he would put his name down a hundred good men should be obtained to sign the bond also; and he swears he signed by means of this inducement. To John H. Quick, Batzner promised he would get a hundred good men on the bond before he presented it to the commissioners. To John Martin he declared he would have a hundred good men on the bond before he attempted to file it. He then signed with that understanding. Alther was promised not less than two hundred names on the bond, and on that consideration he signed it. To Adam Felz, Andrew Grob, and David V. Johnson he made the same pledge,—that he would get a hundred sureties.

The evidence of two of the county commissioners is in the record. The record of the board shows that the bond was approved on the 3d of November, 1862, with the names of the appellants attached, and those also of Batzner and John Grinkmier, in all thirty-one names. The testimony of the commissioners is, that after the bond had been presented for

approval, it was rejected as insufficient. Batzner took it away and returned with additional names. Among those added was that of John Grinkmier. The new names include that of David V. Johnson, and four others below it. That of Witt appeared after it.

These are the substantial facts upon the point in question. Neither George Barry nor Jones signed the bond. The sureties were not present before the county board to execute or acknowledge the execution of said bond. Batzner had procured the signatures at various places in the county, and on divers days.

There is no contest about Grinkmier having been properly discharged.

The other sureties appear to be divided into three classes, — such as signed after Grinkmier, such as affixed their signatures in view of the representations and motives heretofore set forth, as shown by the evidence, and such as signed without having been so influenced.

There are many old authorities to the effect that if a bond is drawn up with the names of several persons inserted in the body of it, as the intended obligors, and it is signed by a part only of those persons, it is not binding upon them, upon the theory that the presentation of the instrument to said persons, so prepared, amounted to a representation that all the persons whose names were so inserted were to become likewise bound: See *Fletcher v. Austin*, 11 Vt. 449 [34 Am. Dec. 698], and authorities cited; *Sharp v. United States*, 4 Watts, 21 [23 Am. Dec. 676].

It seems to us very clear, in view of this principle, that the presentation of this bond to Witt, who signed after Grinkmier, was as effective a representation that the latter was to be a co-obligor with said Witt as would be conveyed if his name had been in the body of the bond. If, in the latter instance, the signature would not be binding on one unless all signed, so we think in this case Witt would not be bound, unless all those names preceding his were also bound, provided the fact that the bond was not presented by the obligee does not vary the rule, a question which we will hereafter examine: *United States v. Leffler*, 11 Pet. 88; *Seely v. People*, 27 Ill. 173. This latter was a suit upon a bond of a master in chancery, in which it appeared that the name of one Heaton was first in order as signed and recited in said bond as surety, and that it was a forgery; that it so appeared when presented to and

signed by Seely, who was the next surety. The bond was joint and several. The court say: "Although we have not been referred to, nor have we met with, a case precisely in point, yet we think, upon principle, this should constitute a good defense to the action on the bond. By a fraud practiced upon the defendant, . . . he was made to assume a different and greater liability than he intended or supposed he was assuming when he executed the bond."

As to those who affixed their signatures after the representations or promises and pledges made by Batzner, as heretofore alluded to, a part of whom stated that they were so induced to sign, a part that such was the condition upon which they signed, and still others, that such was the consideration of their signature, it is more difficult to determine whether they should be considered as bound by their acts.

It is made the duty of a person chosen to the office of county treasurer to execute his official bond with sureties, to the acceptance of the board of county commissioners: 1 R. S. 1852, p. 499. Such bonds are made payable to the state of Indiana: *Id.* 166.

The execution of a bond involves the signing, sealing, and delivering thereof. As these bonds could not be delivered to the state,—the obligee, the law names officers or tribunals to whom they can be delivered; namely, first, to the acceptance of the board of county commissioners, and then to be filed in the clerk's office of the county: 1 R. S. 1852, p. 166, secs. 4, 5.

The bond is, among other things, to secure the amount of money which may come into the hands of the treasurer during his term of office. As this would include money belonging to the county, as well as to the state, which he might receive therefor, the said board is made the actors in accepting his bond; because such board has the general control and management of the fiscal affairs of the county, and in auditing the accounts of officers having the care, collection, and disbursement of the funds of the county: 1 R. S. 1852, pp. 224, 227.

We suppose that, under these provisions, the clerk of the circuit court is the mere custodian of the bond, and the county board acts for the obligee in accepting it. What, then, is the duty of said board in accepting a bond? Clearly, to carefully consider the sufficiency of the bond, as to its legal construction, as to the amount thereof, and as to the solvency of the persons whose names appear as sureties. About this there will, we suppose, be no controversy. Now, it is equally clear

that a bond might be prepared in due form, in a sum sufficiently large; the names thereto attached might represent persons owning property amply sufficient to meet any liability that might arise under it; and yet, if in point of fact any legal reason existed why the persons whose names so appear are not really bound thereby, the security would be worthless. The names might be forged, or might represent persons of ample means, but resting under a disability to so contract; or the signatures may have been obtained thereto, and the instrument placed as an escrow in the hands of a third party, not to be delivered until after the performance of a precedent condition; such as the execution by the principal of a bond of indemnity to those who signed as sureties, and those surreptitiously obtained by the principal and presented for acceptance.

We presume in neither of these cases would an acceptance merely bind the sureties, nor would the county board be in the strict line of duty by accepting without inquiry. If not, how or in what would these instances differ in principle from the facts involved in the case at bar? In the one instance the persons did not attempt to contract; in another they were willing to contract if they were secured; in another they had no capacity to contract. It will be seen that in each instance the acceptance of the bond would be unavailing as a security for the funds that might come into the hands of the treasurer, because the bond had not been executed by parties capable and willing to contract. The principle, then, upon which the defense in each of the supposed cases would rest, would be the non-execution.

Waiving for the present the consideration of the effect of the circumstances under which several of the signatures were procured, we will proceed at once to the examination of the most difficult point which is presented by the facts in the case; namely, that growing out of the relative position of the parties to the bond and those who acted in the premises.

The state could make no representation, nor, as before stated, accept the bond. The duty of accepting is by law devolved upon the board of county commissioners. If the board is strictly but the agent of the obligee in accepting said bond, it might be greatly doubted whether said agent could confer upon another any part of the powers so delegated. If the said board is not a mere agent, then perhaps another might be by said board invested with certain powers connected incidentally with the acceptance of said bond; such as might

conveniently insure the due execution thereof. If the board is the mere agent of the state in the matter, without the right to invest subagents with authority, then it appears to us that whether acting in a ministerial or a judicial capacity there could be but one course in accepting a bond, and that would be to institute inquiry and pass upon all questions connected with its due execution, including the delivery thereof. It would thence appear to follow that the conclusion of such an inquiry would form a proper subject for a record. That record, to be conclusive upon the parties sought to be bound, should show that due preliminary steps had been taken to make them parties to it. The safety of the various funds passing into the hands of a treasurer, as well as the interest of private persons, would seem to imperatively require some such course as this. Indeed, it is, we believe, in various counties of the state, the usage under said statute, and we are inclined to think the safest construction thereof.

But we will proceed to examine another construction sought to be placed upon these statutes and the powers and rights of the county boards; and in the event this construction contended for shall be conceded, it may be that a conclusion upon the point above indicated may not be necessary.

It is insisted that the board of county commissioners adopted the acts, and consequently the representation, of Batzner, in procuring signatures to said bond, as their acts, etc.; that they had the power in that respect to constitute him their agent.

Looking to the fact that the bond of the county treasurer is not alone to secure the separate interests of the state, the obligee named by law therein, but also to secure other interests, over which said board have almost exclusive control, we are inclined to the opinion that, as to questions connected with the execution and approval of said bond, they have some primary powers and rights, such as the right to appoint a person, for instance, their clerk, the auditor to see to the due execution of the bond, that it is properly framed, etc., before presentation. If this is so, we see no valid reason why they might not make the principal obligor in the bond their agent for such purpose. If they could do so before he acted, why could they not adopt his acts afterwards? For instance, did they not adopt the result of his acts in this case? That is, they accepted the bond to which he had procured signatures, without inquiry as to the genuineness of the signatures, or the means that had been resorted to to procure the same. Upon

what theory did they act, upon what principle did they proceed, in so accepting said bond? Certainly, so far as the obligors were concerned, upon the theory that the principal represented them in the presentation of the said bond. And we must assume either that they were entirely derelict in their duty as to the proper inquiry in reference to the execution of said bond, or that they accepted it upon the faith of the fair dealing of Batzner in procuring its execution. If they relied upon his acts, they, that far, adopted them as a substitute for the inquiry they should have made, and in adopting the result of his acts they cannot get rid of the means he used to procure such results: *Judah v. Vincennes University*, 16 Ind. 70.

This brings us to a proper point to inquire as to the effect of the promises, pledges, and representations which Batzner made. Perhaps it is true that, under the circumstances of this case, Batzner, in making said representations and promises, acted without authority from the county board, and that in presenting said bond he was acting for himself and those who signed it. It might be a very serious question, whether, in presenting it before the fulfillment of the conditions or redemption of pledges upon which signatures were procured, Batzner merely exercised his authority as the agent of his co-obligor, if the board could have accepted it without adopting his acts.

Judge Redfield, in the *American Law Register*, in a note to the case of *Seely v. People*, 2 Am. Law Reg., N. S., 346, says: "The law seems to be well settled that a bond or other instrument not negotiable, when one or more of the sureties sign with the assurance that the paper is not to be delivered as a binding contract until all whose names appear in the body of the instrument have become parties to it, will not be binding unless this condition is complied with": April No., 1863, p. 346, and note.

What would have been the practical result if they had not relied upon his good faith in procuring and presenting said bond? They would have, in the regular discharge of their duty, instituted an inquiry into the question of the execution of the bond, as well as that which they did inquire of; namely, its sufficiency.

This inquiry, we must believe, would have developed the facts that are now set up in defense and defeated the acceptance of the bond, if they are now sufficient to discharge the liability of said obligors.

That they are sufficient as to all who signed with the understanding or upon the condition that the bond was not to be presented, consequently not to become operative, until certain other persons signed it, or until a certain number and quality of men signed it, is well established by the following authorities and cases: *United States v. Leffler*, 11 Pet. 86; *Pawling v. United States*, 4 Cranch, 219; *Fertig v. Bucher*, 3 Pa. St. 308; *Sharp v. United States*, 4 Watts, 22 [28 Am. Dec. 676]; *Lovett v. Bowne*, 8 Wend. 380; *Fletcher v. Austin*, 11 Vt. 448 [84 Am. Dec. 698]; *Bibb v. Reid*, 3 Ala. 88; *Auditor v. Nicholas*, 2 Munf. 33; *Fay v. Richardson*, 7 Pick. 91; *King v. Smith*, 2 Leigh, 157; *Collins v. Prosser*, 1 Barn. & C. 682; *Jackson v. Bard*, 4 Johns. 230 [4 Am. Dec. 267]; *Johnson v. Baker*, 4 Barn. & Ald. 440; *Herdman v. Bratten*, 2 Harr. 396; *Bank of Chillicothe v. Chillicothe*, 7 Ohio, 354; *Duncan v. United States*, 7 Pet. 435.

In 2 Greenl. Ev., sec. 297, it is said that "the delivery of a deed is complete when the grantor or obligor has parted with his dominion over it, with intent that it shall pass to the grantee or obligee, provided the latter assents to it, either by himself or his agent." To which is a note, citing a great many cases: See also *Cook v. Brown*, 34 N. H. 474, and authorities cited; and *Cincinnati etc. R. R. Co. v. Riff*, 13 Ohio St. 285; 2 Bla. Com. 307; 4 Kent's Com. 254; *Powers v. Russell*, 13 Pick. 75; *Jackson v. Dunlap*, 1 Johns. Cas. 114 [1 Am. Dec. 100]; *Ogden v. Cowley*, 2 Johns. 274; *Jackson v. Schoonmaker*, 2 Id. 230.

In the case in 11 Peters, the suit was upon a bond given by one Curtis as principal, and Leffler and others as his sureties, for the performance of his duties as collector of taxes, etc. Judgment had been taken against said Curtis. Part of said sureties pleaded *non est factum*. To support the issue made as to the execution of the bond, the deposition of Curtis, the principal, was offered in evidence by the surety, was objected to, but admitted, and the judgment was in favor of such surety, and affirmed in the supreme court of the United States. In the reports, the statement of the facts of the case shows what was contained in the deposition, but does not show whether there was any other evidence upon that point. The supreme court decided that the evidence was properly admitted, and we think that from the opinion it may be inferred that said evidence was material in the case, perhaps decisive thereof, and was as follows: "The deposition stated that Jacob Leffler and Reuben Foreman, executed the bond under the

impression and on the condition that the deponent could procure the signatures of other persons to the same, and they were not so procured." It appears to us, from the whole opinion, that the judgment would not have been affirmed if the facts stated by the witness had been thought insufficient to discharge the sureties.

The case of *Pawling v. United States*, 4 Cranch, 219, was also on the bond of a collector. The plea by the sureties was, that the bond was signed by them and delivered to the principal obligor as an escrow to be by him safely kept, upon condition that if other persons named in the face of the bond should execute it, then it should be delivered as their deed, etc. Issue being joined, there was a demurrer to the evidence, and the supreme court of the United States say that the judgment on the demurrer ought to have been for the defendants. That evidence showed that the first surety who signed did so on the condition that certain other persons named should also sign; that when the next three persons signed, one of them inserted in the body of the bond the names of the persons whom the principal and said surety stated were to sign; and, calling upon the witnesses to take notice that others were to sign, said, "we acknowledge this instrument of writing, but others are to sign." Those others did not sign.

In the case of *Fertig v. Bucher*, 3 Pa. St. 308, the sureties on the bond of a sheriff brought suit on a bond, which they alleged was executed by certain persons to indemnify them as such sureties. The defense was, that the bond was never delivered, because all the persons that were to sign it had not done so. The evidence was very clear that it was not so signed, nor was it delivered; more so, perhaps, than in this case. We refer to the case for the purpose of alluding to the language of the court, as follows: "It would certainly make a great difference to the defendant whether he was bound in company with eleven others in this bond of indemnity, or with a less number. . . . If the defendant, in executing the bond, expressly stipulated that it should not be delivered up until twelve names were obtained, and the plaintiff's agent so provided, the bond was in his hands but in the nature of an escrow; and if the condition was not performed, it was never legally delivered, and so was never the defendant's deed."

The point in the case of *Lovett v. Bowns*, 3 Wend. 380, like that of *United States v. Leffler*, 11 Pet. 86, was upon the admission of the evidence of the co-obligor in reference to the

delivery of the bond, but like that, the reasoning, it must appear to us, in the case supports the view we have taken of the case at bar. The court say, that "if a bond be signed, and put into the hands of the obligee or a third person, on the condition that it shall become obligatory upon the performance of some act by the obligee, or any other person, the paper signed does not become the bond of the party signing the same until the condition precedent be performed. Until then there is no contract."

In the case of *Fletcher v. Austin*, 11 Vt. 448 [34 Am. Dec. 698], one Fletcher, being sheriff, had appointed one Parkhurst his deputy, who presented him with a bond to secure the performance, etc., in the body of which the names of seven persons appeared as sureties; but two had signed. *Non est factum* pleaded by those two. Proof admitted that when the bond was signed by said two persons, they delivered the same to said Parkhurst, and directed him not to deliver it to the plaintiff until it was also executed by all the other persons, etc., and that it was not so executed until after default; but there was no evidence that said Fletcher was informed of the facts, etc. There was a verdict and judgment for the defendants, in which the supreme court, in affirming the same, say: "As to the two who first signed, it is evident that the bond was never delivered with their consent. They might require such terms and conditions to be complied with as they thought proper before the deed should take effect as their deed. . . . The conclusion is, that they never agreed to become sureties for the acts of the principal, unless others should become jointly sureties with them."

The case of *Bibb v. Reid*, 3 Ala. 88, was a suit on an administrator's bond, in which the sureties pleaded a special *non est factum*, and that the bond had been by them delivered to the principal, but was not to be delivered to the obligee, only on the condition that the same should be executed by, etc., as co-sureties, and on that condition said principal was to deliver the same to the said obligee, as the deed of said sureties; that said other persons did not sign, etc., but said deed was, by the principal, delivered, etc. On the trial, the defendants had judgment, in which the supreme court, in giving judgment of affirmance, say:—

"The defendants were the sureties of one Whitman, as administrator, and delivered the bond to him on the condition that if another person signed it as co-surety it was then to

become their deed. It is urged that the conditional delivery could not be to the principal obligor, but to operate as a conditional delivery it must have been made to a stranger. . . . Delivery must be by the obligor himself, or by some one authorized to act for him. In this case, the efficacy of the delivery of the bond unconditionally by Whitman must depend on his authority to do the act, and it would seem impossible to hold that an authority to another to deliver a bond only upon the performance of a condition was an authority to deliver absolutely"; and again: "We are satisfied that on principle there can be no difference between a conditional delivery to a stranger, or to a co-obligor; that in either case the deed cannot be operative until the condition is performed, and such is clearly the weight of the authority at the present time. It was also urged, on the ground of public policy, however the law might be in other cases, that, in cases like the present, where infants and creditors were concerned, and the due execution of the bond intrusted to a public officer, no conditional delivery could be made. We can see no reason for such a distinction. The judge of the county court is, by law, appointed to take the bond, and it is his duty, not only to be satisfied that the sureties are able to respond in damages if called on, but also to know that it has been executed by them."

In the case of *Duncan v. United States*, 7 Pet. 435, the suit was upon an official bond, in the body of which was the name of the principal obligor and three sureties, — but executed by two only. The defense was, that those who signed did so with the stipulation and understanding that another person was also to sign it, who had never done so. The court said that "it is a principle of the common law, too well settled to be controverted, that where an instrument is delivered as an escrow, or where one surety has signed it on condition that it shall be signed by another before its delivery, no obligation is incurred until the condition shall happen."

We have also before us a copy of the manuscript opinion of Judge Betts, of the southern district of New York, in a case of *Law and Conoon v. United States*, delivered July 2, 1860, in a proceeding by them, in equity, to have declared void a bond, purporting to have been executed by them, as sureties of one Fowler, deputy postmaster at New York. It appears from said manuscript that the allegations in the bill, so far as they are in point in this case, were that said Law and Conoon executed said bond in the sum of seventy-five thousand dol-

lars, and delivered the same to said Fowler under the express understanding and agreement that before said bond should be complete or delivered to the government, or to or for its use, it should be executed also by one Oliver Charlick; that it was not so executed by said Charlick, and was without their consent transmitted by said Fowler to the appropriate department at Washington; that upon inspection of the original bond, it appeared that on the day of the date of said bond, one Henry Hilton signed it as a subscribing witness, and, in his capacity of judge of the New York common pleas and *ex officio* justice of the peace, administered an oath to each of said sureties, which was indorsed in print upon the back of said bond, and subscribed by each of them, in which they each depose and say: "He has executed the within bond, that his place of residence is," etc. It was urged that this amounted to an acknowledgment, etc., of said bond. The judge says: "I think no higher legal effect is acquired for the bond by that method of verifying its execution than satisfactory oral evidence of the signature of the parties would be. . . . Nor does it in any way preclude the proof that it was executed conditionally." He further says that a "vital constituent to a bond is the delivery of it from the obligor to the use of the obligee. It remains inchoate and inoperative until that act is completed. . . . A sealed obligation never takes existence as a deed or specialty until a delivery be made of it by the obligor, or the terms upon which its absolute delivery may be suspended have been fulfilled. These may be regarded as elementary principles of the common law, determining the requisites of deeds or sealed obligations, although in books of evidence the rules may be found subject to diversities of application: 1 Greenl. Ev., sec. 568, note; 3 Cowen and Hill's Notes to Phill. Ev., pp. 1276, 1281, 1286, 1453. Yet I apprehend none of them depart from the main doctrine of the common law, and all concur in requiring clear proof that the grantor or obligor has absolutely parted with the possession of the deed to the uses for which it was executed. The cases referred to show that a broad freedom of inquiry is involved in the consideration of the ingredients which constitute a complete delivery, amongst which a leading, if not the controlling one, is to ascertain and determine both the acts and motives of the parties engaged in the transaction: *Jackson v. Dunlap*, 1 Johns. Cas. 114 [1 Am. Dec. 100]; *Powers v. Russell*, 13 Pick. 69, 75; and when the intention to deliver is not made out, the execution of a deed will not give it vitality and operation."

As to those who signed without any false representations, promises, or pledges having been made to them, we are clearly of the opinion that the bond is of no binding force. Each man had a right to rely upon the fact which appeared before him on the bond, namely, that he was entering into a contract in which certain other men, whose names were there signed, were jointly bound with him. When they are discharged it increases his liability, and in fact it is no longer his contract, and the contract which he supposed he was making.

In the case at bar, the man whose name first appears as surety would be discharged under the ruling as to the non-performance of promises, etc., and consequently each one that followed would be released. This must be the case, unless it was the special duty of each person who signed it to inquire and know for himself the terms and conditions, if any, upon which each preceding name was placed to the instrument. Whatever may be the rule upon this point as between co-obligors who sign a bond not negotiable without the procurement of the obligee, it cannot be otherwise than as above indicated, where the signatures are procured by one who is acting as the agent of the obligee, or whose acts are afterwards adopted in that behalf by said obligee: *Auditor v. Nicholas*, 2 Munf. 33; *Mann v. Alberti*, 2 Binn. 195; *Wilkinson v. Bennett*, 3 Rand. 316; *Conrad v. Harrison*, 3 Leigh, 590; *Barrington v. Bank of Washington*, 14 Serg. & R. 405; *Wood v. Washburn*, 2 Pick. 24; *Bean v. Parker*, 17 Mass. 591.

BOND NOT SIGNED BY ALL PARTIES NAMED THEREIN, VALIDITY OF: See *Fletcher v. Austin*, 34 Am. Dec. 689, and cases in note; *Readfield v. Shower*, 79 Id. 592. The ruling in the principal case, that where a bond has been signed and delivered to the principal obligor by a surety on the condition that others not named in it shall sign it before its delivery to the obligee, and it is delivered without such signatures being obtained, and received by the obligee without notice of the condition, the condition will avail the surety in a suit thereon as a defense, was overruled directly on another hearing of the case: *State v. Pepper*, 31 Ind. 76, 87; the basis of the decision being that the surety was estopped by placing the instrument in the hands of the principal for delivery without notice of the facts to the obligee. To the same effect, applying the rule to sureties on notes as well as bonds, see *Deardorff v. Foreman*, 24 Id. 482; *State v. Blair*, 32 Id. 314; *Smith v. Peoria County*, 59 Id. 419. But to the contrary, and favoring the view of the principal case, see *Daniels v. Gower*, 54 Iowa, 321; *United States v. Hammond*, 4 Biss. 285.

THE PRINCIPAL CASE IS CITED IN *Neal v. State*, 49 Ind. 51, to the point that in Indiana the relator in an action on an official bond of a county treasurer is properly the county auditor.

MUSSELMAN v. McELHENNY.

[28 INDIANA, 4.]

NEGOTIABLE NOTE AT COMMON LAW IS ONE PAYABLE TO ORDER OR BEARER; and such note may have a *bona fide* holder who has honestly received it for a consideration, ignorant of any vice in its original execution, and against whom such vice cannot be set up as a defense to a suit thereon.

IN INDIANA, NOTES, UNLESS PAYABLE AT BANK IN THAT STATE, CANNOT HAVE BONA FIDE HOLDER, as to defenses, although they are so far negotiable as to be transferable and suable by the holder.

MAKER OF NOTE NOT MADE PAYABLE AT BANK IN INDIANA MAY BE ESTOPPED by his own acts from setting up defenses against a *bona fide* holder of it, notwithstanding he could not, by the law merchant, be prevented from setting up such defenses.

PARTY MAY ESTOP HIMSELF BY HIS OWN ACT of such character, and so performed as to induce another to pursue, and justify him as a man of ordinary prudence in pursuing, a given course of conduct, to deny the existence of the facts, on the belief of the existence of which, so induced, such course of conduct was adopted.

USURY DOES NOT SUBJECT TO PENALTIES OR FORFEITURES in Indiana, since 1853.

IF USURIOUS INTEREST IS TAKEN OUT IN ADVANCE, it makes a case of want of consideration, in a note covering the amount, to the extent of such interest.

WHERE USURIOUS INTEREST IS PAID ON NOTE AFTER ITS EXECUTION, it amounts to a payment of so much on the principal; and if the amount thus paid exceeds the principal, it may be recovered back.

PROMISE MADE IN NOTE TO PAY USURIOUS INTEREST IN FUTURE is promise, to that extent, without consideration.

MAKER OF NOTE NOT GOVERNED BY LAW MERCHANT CANNOT SELL IT for a price less than that expressed on its face, so as to preclude himself from setting up want of consideration to the extent of the discount, unless, perhaps, where the sale was by agent, a possible case of estoppel may be created.

WHERE ONE BORROWS SUM OF MONEY, AND GIVES HIS NOTE FOR LARGER SUM, payable to the bearer, with interest, and the person to whom it is given on the next day sells the note to a third person, to whom he procures the maker to execute a mortgage to secure the note, no inquiry being made, and no information given about the consideration of the note, the mortgagor is not estopped by the mortgage from pleading, against the mortgagee, a failure of consideration as to the amount of the difference between the face of the note and the sum actually borrowed.

SUIT on note and mortgage. The opinion states the case.

Daniel D. Pratt and Daniel P. Baldwin, for the appellant.

E. Walker, for the appellee.

By Court, PERKINS, J. Suit upon a note and mortgage. The note is dated November 15, 1855, and the mortgage November 17, 1855. The following is a copy of the note:—

"\$500.

LOGANSPORT, NOV. 15, 1855.

"One year after date I promise to pay to the bearer of this note five hundred dollars, for value received, with interest, and without any relief whatever from valuation or appraisement laws.

SAMUEL McELHENNY."

It is necessary in the cause, and may as well be done at this point, that we declare the exact character of the above-copied note. It is a negotiable promissory note, and at common law might, as to defenses against the same, have a *bona fide* holder. A negotiable note, at common law, is one payable to order or bearer; that is to say, one whose terms authorize its transfer to another person than the one to whom it is originally executed; and such note, as to defenses, may have a *bona fide* holder; that is, a holder who has honestly received it for a consideration, ignorant of any vice in its original execution, and against whom such vice cannot be set up as a defense to a suit upon the note. It is this class of notes that elementary writers refer to when they speak of negotiable notes: 2 Parsons on Notes and Bills, 426; 2 Parsons on Contracts, 422 et seq.

In Indiana, though all those notes which were negotiable at common law, and many others, are negotiable so far as to be transferable and suable by the holder, yet they have not the other qualities of a negotiable note at common law, and cannot, as to defenses, have a *bona fide* holder; this incident not attaching to them unless they are payable at a bank in this state. The common-law privileges of negotiable notes are confined, in this state, by statute, to that portion of such notes as are drawn payable at a bank in the state: *Snyder v. Oatman*, 16 Ind. 265; see *City of Aurora v. West*, 22 Id. 88 [*ante*, p. 413]. But notwithstanding the maker of the note in question could not be prevented by the law merchant from setting up defenses against a *bona fide* holder of it, still there is another doctrine which might have that effect, to wit, the doctrine of estoppel. A party may, by his own act, of such a character and so performed as to induce another to pursue, and justify him as a man of ordinary prudence in pursuing, a given course of conduct, estop himself to deny the existence of the facts, on the belief of the existence of which, induced as above, such course of conduct was adopted: *Ray v. McMurtry*, 20 Ind. 807; *Windle v. Canaday*, 21 Id. 248; *Pepper v. State*, 22 Id. 399, 419 [*ante*, p. 430]; see also 22 Id. 506 et seq., in the note to *Aurora v. West*. In this case, the defenses of usury, want of consideration, and payment, were set up to the whole or part of the

cause of action in the complaint mentioned; and on the trial, the defendant had judgment in his favor. And here we may note the character of our present usury law. It is almost entirely changed from what it was in the past. Down to 1853 it was a penal law. It is such no longer. Usury no longer subjects to penalties or forfeitures: *Wood v. Kennedy*, 19 Ind. 68.

1. If usurious interest is taken out in advance, then it makes a case of want of consideration in a note covering the amount to the extent of such interest; and if the note be drawn with interest from date, in an amount covering interest taken out in advance, then there is a want of consideration for the note to the whole amount thus taken out of the sum nominally loaned, or added to the amount of the note, if that course is taken, beyond what is actually paid to the maker, or is actually due from him, with the accruing interest on such excess, because the legal interest is provided for and runs upon the note by its terms.

2. If usurious interest is paid on the note after its execution, it amounts to a payment of so much on the principal of the note; and if the amount thus paid exceeds the principal, it may be recovered back.

3. If the promise is made in the note to pay usurious interest in the future, it is a promise to that extent, without consideration; and so, if the promise is contained in a verbal promise to pay interest, for such a promise is not within the statute of frauds: *Wood v. Kennedy*, 19 Ind. 68.

Another proposition may be here stated; viz., that while a man may sell for what he pleases notes he may own, executed by third persons, he cannot sell for cash, either himself or by agent, his own note,—that is, a note of which he is maker, especially if the note is not one governed by the law merchant,—for a price less than that expressed on its face, and by such sale preclude himself from setting up want of consideration to the extent of the discount, unless, perhaps, where the sale was by agent, a possible case of estoppel might be created: See *Parsons on Notes and Bills*, *supra*. Selling one's own note is giving one's own note for the consideration received on the sale.

In the case at bar, McElhenny received four hundred dollars, and no more, as the consideration of the note. About this fact there is no dispute, and that sum, with interest, is all that Musselman, the holder, can recover, unless there is an estoppel in the case. Is there such? We do not inquire whether an

estoppel was so pleaded that evidence of it was properly admissible on the trial, but whether the evidence shows one to have existed. We shall state the case upon the plaintiff's, the appellant's, hypothesis, as alleged in his complaint and proved by his evidence. It is this, in short: McElhenny, a citizen of Logansport, borrowed of one Haney, on the 15th of November, 1855, four hundred dollars, and gave his note for five hundred dollars, with interest. McElhenny told him he would give a mortgage to any holder to secure the note. On the same or the following day Haney offered to sell the note to Musselman, also a citizen of Logansport. Musselman agreed to buy it if a mortgage was executed to secure it. Haney went to McElhenny and obtained the mortgage in this suit, drawn in the usual form to Musselman, to secure the note in question. Musselman never inquired a word about the consideration of the note; nobody said a word to him about it; there was no communication between him and McElhenny whatever, but Musselman claims that the execution of the mortgage amounted to an estoppel. We cannot think so. Haney has a note on McElhenny. On the very day of its date, or the day following, he offers the note to Musselman for sale. On the next day Haney calls on McElhenny for a mortgage to Musselman, and without saying anything further, so far as appears, as to his transaction with Musselman, obtains the mortgage, and delivers it to Musselman. Now, certainly, as Musselman did not call on McElhenny, the latter would have a right to presume that Musselman had ascertained from Haney all about the note and its consideration; no ordinarily prudent man would have purchased the note without; and hence McElhenny could not have supposed that Musselman could receive the mortgage otherwise than as based upon a consideration co-extensive with that of the note it was to secure. Musselman had all the means of obtaining accurate knowledge. We think it clear that McElhenny's act in executing the mortgage, as it was done in this case, amounted to no representation of an obligation to pay beyond what the consideration of the note might be—no representation on which a man of ordinary prudence could have been supposed to rely beyond that. The case lacks one of the necessary elements of estoppel; viz., a state of facts showing a right in Musselman to rely in his action on any false statement of McElhenny: *Piper v. Gilmore*, 49 Me. 149, is strongly in point.

Judgment affirmed, with costs.

USURY, WHAT CONSTITUTES: See *Smith v. Stoddard*, 81 Am. Dec. 778, note 780.

NEW SECURITY, INCLUDING SUM FOR UNLAWFUL UNPAID INTEREST, is so far without consideration: *Smith v. Stoddard*, 81 Am. Dec. 778, note 781.

COMMON-LAW PRIVILEGES OF NEGOTIABLE NOTES ARE IN INDIANA CONFINED to such notes as are drawn payable at a bank in that state: *Hunt v. Standart*, 77 Am. Dec. 79, note 87, where other cases are collected; *Parkinson v. Finch*, 45 Ind. 128, citing the principal case.

NEGOTIABILITY OF NOTES AT COMMON LAW: See *Smalley v. Wight*, 69 Am. Dec. 112, note 115, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *Wiley v. Starbuck*, 44 Ind. 308, to the point that if usurious interest is paid on a note after its execution, it amounts to a payment of so much on the principal of the note; and if the amount thus paid exceeds the principal it may be recovered back. The case of *State v. Murphy*, 23 Id. 48, was decided upon the authority of the principal case.

TURNER v. COOL.

[28 INDIANA, 56.]

GROWING CROP AS BETWEEN VENDOR AND VENDEE IS PART OF REALTY, and as a general rule the sale and conveyance of the land by its owner carries the property in the crop to the purchaser.

CONVEYANCE OF LAND CARRIES PROPERTY IN CROP GROWING THEREON TO GRANTEE, notwithstanding an agreement in writing previously signed by the parties expressly reserving the growing crop to the vendor; because, by the execution of the deed, the preliminary contract is executed, and any inconsistencies between its original terms and those of the deed are to be explained and settled solely by the deed into which the contract is merged.

BURDEN OF PROOF IS UPON PLAINTIFF IN REPLEVIN where the answer sets up, in substance, property in the defendant.

REPLEVIN. The opinion states the case.

John Morris, for the appellant.

W. H. Combs, for the appellee.

By Court, DAVISON, J. The appellee, who was the plaintiff, sued the appellants, who were the defendants, in replevin, to recover a quantity of wheat in the sheaf. Defendants answered that on April 28, 1862, the plaintiff, by his warranty deed, conveyed to them the land therein described, and they took immediate possession of the premises, on which the wheat in suit was then growing; whereby it became and still is their property. Reply: 1. By a denial; 2. Property in the plaintiff; 3. Plaintiff, on the 10th of March, 1862, sold the land described to the defendants for three thousand one hundred dollars. At

the time it was sold, there was growing thereon eighteen acres of wheat, estimated at three hundred dollars. In pursuance of the sale, an agreement in writing was entered into between the parties, which, after setting forth the terms of sale, stipulated that Cool was "to have the wheat on the ground, and the straw," and Turner's were "to let him have one bay in the barn for the wheat, if he should want it, and the privilege of thrashing his wheat in the barn"; which agreement was placed in the hands of one Hill, as evidence of the contract of sale. It is averred that the wheat was to be held by plaintiff as a part of the consideration for the sale of the land, and that, on the 28th of April, 1862, he executed and delivered to the defendants a deed, with covenants of warranty, for the land, in which no mention was made of the wheat; but the same was executed and delivered with the full understanding and intent that plaintiff was to have the wheat as stipulated in the agreement, which agreement was not surrendered to the defendants, or in any manner canceled or made void, but still remains in the custody of Hill, and as to the stipulation in regard to the wheat remains in full force. It is further averred that defendants, after the wheat became ripe, wrongfully, and without the plaintiff's consent, cut the same, and bound it into sheaves, etc.

Defendants demurred to the third reply, but the demurrer was overruled, and they excepted. The court, "the cause having been submitted to it for trial," "held that the burden of the issue was on the defendants, and they refusing to introduce any evidence, and the plaintiff also failing to produce or offer any evidence in support of his case, the court, upon the pleadings, without hearing any evidence, found for the plaintiff," and having refused a new trial, rendered judgment, etc. The decision of the court upon the demurrer to the reply involves this question: Was the conveyance of April 28th an extinguishment of the reservation contained in the agreement of the 10th of March?

As between the vendor and vendee, the growing crop is a part of the realty; and as a general rule, the sale and conveyance of the land by its owner carries the property in the crop to the purchaser. Does the case made by the reply constitute an exception to the rule?

In *Chapman v. Long*, 10 Ind. 465, it was held that "where a sale of real estate precedes the execution of the deed by some time, a verbal reservation to anything that would legally

pass by the deed without such reservation will be presumed to be merged in the deed, and where the deed is executed at the time of the sale, such a reservation will be considered in the light of an exception or defeasance, and, being repugnant to the legal effect of the deed, will be held void." This decision is supported by authority, and we are inclined to follow it. But here the reservation is evidenced by an agreement in writing signed by the parties. And the inquiry at once arises, whether, by the execution and delivery of the deed, the reservation became extinguished.

By the agreement of March 10th, the plaintiff does not sell the wheat; he expressly refuses to do so; nor were the defendants, in virtue of that agreement, entitled to an unconditional deed; but such a deed was executed to them while the wheat crop was growing on the land conveyed; and the wheat, as between the vendor and vendees, being a part of the realty, it seems to follow that the conveyance, in legal effect, carried the property in the crop to the grantees, because, "by the execution of the deed, the preliminary contract is executed, and any inconsistencies between its original terms and those of the deed are to be explained and settled by the latter solely, into which the former is merged, and by which the parties are thereafter to be bound": Rawle on Covenants, 612. Thus, in *Williams v. Morgan*, 15 Q. B. 782, S. C., 69 Eng. Com. L. 781 (the preliminary agreement having been offered in evidence for the purpose of showing what passed by the deed), Coleridge, J., said: "We must see for what purpose this agreement was tendered in evidence. It was to show what passed by the purchase. I think it was not evidence for that purpose. What was actually conveyed depends, not on the preliminary agreement, but on the terms of the deed, which may be made to vary from those of the agreement."

The agreement might be altered, modified, or changed by the subsequent deed; but no one, we apprehend, will pretend that such agreement could modify or limit such deed. We are advised that *Morris v. Whicher*, 20 N. Y. 41, is in conflict with the view we have taken; but the current of authority being adverse to the New York decision, we are not inclined to follow it. Under the facts of this case, we deem it very clear that the agreement of March 10th was executed and extinguished by the plaintiff's deed to the defendants, and the wheat crop being, as between the parties, a part of the realty, passed to the defendants by the conveyance: *Conner v. Coffin*,

22 N. H. 538; *Trullinger v. Webb*, 3 Ind. 200; 4 Kent's Com., 10th ed., p. 563, note 1; *Foots v. Colvin*, 3 Johns. 222-506 [3 Am. Dec. 478]; *Gregory v. Griffen*, 1 Burr. 208; *Creigh v. Beevin*, 1 Watts & S. 83; *Wilson v. McNeal*, 10 Watts. 427.

But there is another question to settle: Upon whom rested the burden of the issues? This, as we have seen, was an action of replevin to recover wheat in the sheaf. The answer sets up in substance property in the defendants. The pleading thus made, though it does not directly deny that the sheaves of wheat were the property of the plaintiff, does so argumentatively, and therefore rested the burden of the issues on the plaintiff: *Austin v. Swank*, 9 Ind. 109; *Garrison v. Clark*, 11 Id. 369; *Riddle v. Parke*, 12 Id. 90; *French v. Howard*, 14 Id. 455; *Meredith v. Lackey*, 14 Id. 529-534.

Judgment reversed.

GROWING CROPS PASS BY DEED OF LAND: See *Backenstoss v. Stahler's Adm'r*, 75 Am. Dec. 592, note 598; *McLwaine v. Harris*, 64 Id. 196, note 197, where other cases are collected.

RESERVATION IN DEED REPUGNANT TO ESTATE GRANTED IS VOID: See *Goy v. Walker*, 58 Am. Dec. 734, note 736; *Pyncheon v. Stearns*, 45 Id. 210, note 214, where other cases are collected; *Fordyce v. Hardesty*, 36 Ind. 26, citing the principal case.

PLEA OF PROPERTY IN STRANGER PUTS BURDEN OF PROOF IN REPLEVIN UPON PLAINTIFF: *Landers v. George*, 40 Ind. 163, citing the principal case.

THE PRINCIPAL CASE IS DISTINGUISHED IN *Wells v. Rhodius*, 87 Ind. 5.

HARTFORD FIRE INSURANCE COMPANY v. ROSS.

[28 INDIANA, 179.]

POLICY OF INSURANCE IS AVOIDED BY SALE OR TRANSFER BY ONE PARTNER to one of his copartners, of his interest in the partnership property, without the consent of the company, and before the loss occurs, where the policy contains the condition, "that in case of any sale, transfer, or change of title of any property insured by this company, or of any undivided interest therein, such insurance shall be void and cease." And it is not material that such sale and transfer were made without the assent of another partner.

ACTION on a policy of insurance. The opinion states the case.

Barbour and Howland, for the appellant.

S. A. Bonner and B. W. Wilson, for the appellee.

By Court, RAY, C. J. Complaint upon a policy of insurance, executed by the appellant to the appellees, bearing date February 10, 1862, by which it was agreed to make good to Ross, Shirk, and Logan, who were partners in trade, as is averred by the complaint, all loss or damage not exceeding \$2,250, which should happen by fire to their pork and slaughter-house during the term of nine months from the date of said policy. The complaint, after setting forth the policy, contained the usual averments, showing the payment of premium and compliance with the conditions of the policy on the part of the insured, and that the pork and slaughter-house, with all its fixtures and appurtenances, was destroyed by fire on the fifth day of November thereafter.

The appellant filed answer, to the second paragraph of which answer the appellees filed a demurrer. This demurrer was sustained by the court, and by exception and appeal this ruling is presented for review.

This paragraph of the answer averred that Logan, one of the assured, had sold and transferred his interest in the property insured, after the policy issued, and before the loss occurred, to Shirk, one of his partners, without the consent of the insurance company.

By the fourth condition of the policy, it is provided "that in case of any sale, transfer, or change of title of any property insured by this company, or any undivided interest therein, such insurance shall be void and cease."

In construing the provisions of an insurance policy, it is urged "that the courts have adopted very rigid rules of construction against insurance companies," and "that such provisions, covertly included as means of escape in case of accident, are strictly construed."

We regret that counsel have been able to cite authorities for such a position. By what legal logic the conclusion has ever been reached, that the printed conditions of a policy of insurance are "covertly included" in the policy, we have never understood. The rules for construing written instruments are well established, and their application cannot depend in this court upon the parties to the contract.

The object of the condition in the policy of insurance is evident. Each party to the contract is interested in knowing with whom the engagement is made. The insured looks to the reputation for responsibility, promptness, and fairness of the corporation. The insurers look, with an interest as earnest,

to the integrity and business capacity of the insured,—to the motive prompting the insurance. To them, the contract is peculiarly a personal one; and the condition of the contract is, that the persons with whom they enter into it shall remain the same. When the instrument was executed, they depended upon a certain amount of caution, skill, and forethought in the care of the property, and they perhaps relied upon the moral honesty of some one or all of the insured to resist, in the future, any temptation to permit the destruction of the property should it prove an unprofitable investment. Any change of interest may prove destructive of the prime motive for the contract. The introduction of a new partner may also introduce a dangerous element; the retirement of one member of the firm, or of one owner in the property, may withdraw also the personal integrity or the skillful care that induced the insurance.

It is insisted, however, by the appellees, that the answer should also aver the sale and transfer of the interest to have been made with the knowledge and consent of Ross, the other partner, unless the loss resulted from such transfer. The insured undertook that the conditions of the policy of insurance should not be violated.

They contracted with the corporation that no one of their number should sell or transfer his interest in the property; they contracted also for certain reasonable care in preserving the property. If one of the parties, by neglect of such care, caused the destruction of the building, are the insurers required to have the consent of the others to such neglect? And if a clear violation of a condition upon which the validity of the policy depends be shown, it is not to be insisted that loss must result from such violation to enable the company to defend. They may stand upon the express terms of their bond.

The view adopted in this case accords with the weight of authority. The decision of the supreme court of Illinois in the case of *Dix v. Mercantile Ins. Co.*, 22 Ill. 272, was to the same effect. *Dix*, *Sinclair*, and *Harris* insured their stock, and afterward, and before loss, *Sinclair* sold and transferred his interest to *Dix* and *Harris*, and the loss occurred while they continued owners. The condition declared the policy void "in case of any transfer or change of title in the property insured by the company, or of any individual interest therein." The court say: "Here was a transfer by one of the insured to the others of his undivided interest in the property insured. There is a change of title to an undivided interest in the prop-

erty. At the date of the policy it belonged to Sinclair; at the time of the loss it was the property of Dix and Harris; so that there was a complete transfer and change of title to this undivided interest": See also *Tillou v. Kingston Mut. Ins. Co.*, 5 N. Y. 405; *Hozsie v. Providence Mut. Fire Ins. Co.*, 6 R. I. 507; *Baltimore Fire Ins. Co. v. McGowan*, 16 Md. 47.

In the case of *Finley v. Lycoming County Mut. Ins. Co.*, 30 Pa. St. 311 [72 Am. Dec. 705], an insurance was effected by Finley and Stanley, partners. The charter of the company provided that "when property insured by this corporation shall be alienated by sale or otherwise, the policy shall thenceforth be void." The same condition was inserted in the policy. Finley, after the insurance, sold all his interest in the property insured to Stanley, without notice to the company.

The court say: "It is said by the defendants in error that this was not a case to which these conditions attached; that the property insured was partnership property; that it remained in original hands; and that the transfer by Finley was but a release of his interest to Stanley. This is neither a sound, legal, nor practical view of the question. The stipulation regards alienation by 'sale or otherwise.' If what took place between Finley and Stanley passed the interest in the property of the former to the latter, then it was within the terms of the condition, it was alienation by sale; but if not, it was alienation 'otherwise.' It was against alienation the prohibition was leveled, and the mere use of terms will not defeat the intent. That a sale by one partner to another is within the prohibition cannot be doubted; there is no exception in its favor in the instrument, and the terms used give no room to imply any. By the transaction the one parted with all his interest and the other acquired double what he previously possessed. This is a legitimate consequence of sale and purchase, and no substitution of terms will make it anything else. This was fully affirmed in the case cited from *Tillou v. Kingston Mut. Ins. Co.*, 5 N. Y. 405. And the question arose there upon a precisely similar condition, and after a transfer by one partner to another. We have no authority in our reports on the point, but consider the case cited as authority; being directly on the issue and fully determining this part of the case against the plaintiffs."

It has been held by the same court, in a more recent case, that "a transfer by one tenant in common to a co-tenant, or from one partner to another, is within the prohibition of a

policy of insurance which declares that alienation by sale or otherwise shall forfeit the policy": *Buckley v. Garrett*, 47 Pa. St. 204.

Upon principle and authority the answer must be held, its truth being admitted, as a bar to the action.

The case is reversed, with costs, and the court below is directed to overrule the demurrer to the second paragraph of the appellant's answer.

ALIENATION OF PROPERTY INSURED, EFFECT OF: See *Phoenix Ins. Co. v. Ross*, 81 Am. Dec. 521, note 530, where other cases are collected. A transfer or alienation of property insured avoids the policy, where the policy so provides: *Home M. F. I. Co. v. Hauslein*, 60 Ill. 523, citing the principal case.

HARRISON v. FINDLEY.

[28 INDIANA, 265.]

BOTH JUDGES AND JURORS SHALL UNDERSTAND WORDS IN THAT SENSE WHICH AUTHOR INTENDED TO CONVEY to the minds of the hearers, as evinced by all the circumstances of the case. The jury are to decide, as a matter of fact, to be collected from all the concomitant circumstances, whether the words were used maliciously and with a view to defame; and it is for the court to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action.

DOCTRINE THAT WORDS MUST BE CONSTRUED IN MITIORI SENSU has been exploded.

IF ANY SET OF WORDS CHARGED IN ANY ONE OF PARAGRAPHS OF COMPLAINT IS ACTIONABLE, a demurrer to that paragraph should be overruled.

CERTAIN WORDS HELD TO BE ACTIONABLE PER SE, and others to be made so by the facts alleged.

ACTION for slander. The opinion states the case.

William K. Marshall and R. M. Patrick, for the appellant.

By Court, GREGORY, J. Harrison sued Findley in slander. The complaint consists of three paragraphs. The words charged in the first paragraph are these:—

"1. Enoch Harrison is getting along too fast; they are doing a large business there; people wonder where they get their capital; there have several travelers died there, and it is the opinion of the people that they have been hurried away; it appears that none of them had money enough left to bury them. I saw something there one morning myself that satisfied me. I was at Enoch Harrison's one morning, and saw water dropping through the ceiling. I took it on myself to go upstairs

and see what all that meant, and then I found his wife scrubbing up the floor; she looked down-hearted when she saw me. I asked her what that meant, and she faintly replied that a traveler had died there. It appears he had not money to bury him. It is supposed he was hurried away.

"2. Harrisons are getting along too fast; doing a large business; some people wonder where they got their capital. I saw something there myself that satisfied me how they got it. I was there one morning, and saw something dripping through the ceiling, and I took it upon myself to go upstairs and see what it meant, and found Enoch's wife scrubbing up the floor, and she said a man had died there. That man was hurried out of the way, and had not money enough left to bury him. Several travelers have died there, and it appears that none of them had money enough left to bury them, and it is the general opinion that they were hurried out of the way for their money.

"3. He [meaning plaintiff] is getting along very fast, and doing a slashing business; some folks don't know how he got his money. I saw enough there [meaning at plaintiff's house] myself one morning to satisfy me; there was something dripping through the ceiling, and I went upstairs to see what it meant, and found his [meaning plaintiff's] wife scrubbing up the floor, and asked her what that meant, and she said a traveler had died there. Several travelers have died there, and none of them had money enough left to bury them; they were all put out of the way for their money.

"4. I went to Enoch Harrison's one morning, and saw enough there to satisfy me where he gets his money. There was something dripping through the ceiling, and I asked what it meant, and was told that a traveler had died there, and it seems he had not money enough left to bury him. He was put out of the way for his money. Several travelers have died there, and none of them had money enough left to bury them. He got their money, and that accounts for his getting along so fast. Several travelers have been put out of the way there [meaning at plaintiff's house] for their money, and he got it; none of them had any left to bury them. His [meaning plaintiff's] wife said a traveler had died there [meaning at plaintiff's house]. He was hurried out of the way for his money, and had not enough left to bury him; more than one traveler has been hurried out of the way there [meaning at plaintiff's house], and none of them had money enough left to bury them, and that's how he gets along so fast.

"5. They are getting along too fast; they have hurried more than one traveler out of the way for his money, and didn't leave them enough to bury them."

The plaintiff, for the purpose of making these words actionable, charges "that at the time of the speaking by the defendant of plaintiff of said defamatory matter, plaintiff was and for a long time had been the keeper of a house of entertainment for travelers and boarders, and that the defendant then and there and thereby, by each and every of the foregoing sets of words, intended to charge and to be understood that plaintiff had feloniously robbed, and by violence taken from the persons in his said house their money, and had killed and murdered such travelers, and caused it to be done for the like purpose of robbing them, and to escape detection and punishment therefor; and that defendant then and there and thereby was so understood to charge the plaintiff by those who heard him speak said words."

The words charged in the second paragraph are these: "I have found out all about the bottle; I am able to prove that they [meaning plaintiff and another] fixed it up. I learned at Corners, in Iowa, that they [meaning one John Ruddick and one Hiram Wheedon] had the bottle there, and that was the cause of their [meaning said Ruddick and said Wheedon] death, and I believe that was the cause of their death [meaning then and there and thereby that plaintiff had fixed up a bottle for the purpose, and that the same had caused the death of said John Ruddick and said Hiram Wheedon]." For the purpose of making these words actionable, the plaintiff "averts that said John Ruddick and said Hiram Wheedon had, before the time of speaking of said defamatory matter of plaintiff by defendant, died in the state of Iowa, which fact was then understood by those who heard defendant; and that said defendant then and there, by said defamatory matter, meant and intended to charge that plaintiff, by fixing up a bottle for that purpose, had feloniously and purposely caused the death of said Ruddick and Wheedon, and defendant was then and there and thereby so understood to mean and charge plaintiff by those who heard such matter."

The words charged in the third paragraph are these:—

"1. Wheedon and Ruddick took a bottle of whisky from Seymour that Harrison had fixed and sealed up, and the orders from Harrison were not to drink it nor unseal it till they [Ruddick and Wheedon] got to Iowa, and then they were to

drink a health to their old friends; and when they got to their journey's end they drank it, and died right away, and it is supposed it killed them.

"2. Ruddick and Wheedon took the bottle of whisky from Harrison's, but the orders were not to unseal it till they got to Iowa, and then to drink out of it a health to the Harrisons, and to their old friends; and when they got to Iowa, they drank it, and died right away, and it is supposed that killed them. Harrisons had fixed it up and sealed it.

"3. Do you know anything about the bottle that Harrisons fixed up? They say that they fixed one up, and Ruddick and Wheedon took it with them to Iowa. Harrison's directions to them were not to uncork it or unseal it till they got to their journey's end; and when they got to Iowa they drank it, and died the same day.

"4. Have you heard the report about old uncle Davy and Enoch fixing up two bottles of whisky, and charging Ruddick and Wheedon not to drink it until they landed in Iowa? They died in three or four days after they drank it; there must have been something in it.

"5. There is no doubt but they got the money. I learned that they prepared a bottle of whisky, and sealed it up, and gave it to Ruddick and Wheedon, and charged them very particularly not to unseal it till they crossed the line and got to Corners, where there was no good liquor; then they were to unseal it, and drink a health to their old friends. Don't you see how nice that could have been worked, to fix up a bottle of whisky, get their money, then, after they got to Iowa, to drink, and die the same day, and that would be the last of it, as dead folks tell no tales? That report is out, and it looks reasonable.

"6. I found out all about that bottle of whisky; I am able to prove that they [meaning this plaintiff and another] fixed it up. I learned at Corners, in Iowa, that Ruddick and Wheedon had it there, and that it was the cause of their death, and I believe it.

"7. They fixed up a bottle of whisky, and gave it to Ruddick and Wheedon, who took it with them to Iowa, and drank it, and it killed them both.

"8. Don't you see how nice they managed it? After they [meaning plaintiff] got their money [meaning the money of Ruddick and Wheedon], they fixed them up a bottle of liquor, and told them not to drink it till they got to Iowa, and they

drank it there, and died in a few days; they thought dead men tell no tales, and managed it accordingly."

To make these words actionable, the plaintiff "averts that defendant, in speaking of the plaintiff the defamatory matter aforementioned, alluded to the death in the state of Iowa of one John Ruddick and one Hiram Wheedon, which had occurred before the times of the speaking by defendant of plaintiff of such defamatory matter, which fact was well understood then and there by those who thus heard defendant defame this plaintiff; and that defendant then and there, by each and every of the foregoing sets of words, meant to be understood and charged, and did charge then and thereby that this plaintiff had feloniously and purposely caused the death of said John Ruddick and that of the said Hiram Wheedon, and that defendant was then and thereby so understood to mean and to charge this plaintiff by those who heard him."

A separate demurrer was sustained to each of said paragraphs, and a final judgment on demurrer rendered in the court below against the appellant. The sufficiency of these several paragraphs of the complaint is the subject for our determination.

The rule laid down by Mr. Starkie, in his treatise on slander, and approved by this court in the case of *Rodgers v. Lacey*, 23 Ind. 507, at this term, is as follows: "Both judges and jurors shall understand words in that sense which the author intended to convey to the minds of the hearers, as evinced by the whole circumstances of the case. It is the province of the jury, where doubts arise, to decide whether the words were used maliciously, and with a view to defame; such being matter of fact, to be collected from all concomitant circumstances; and for the court to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action."

The doctrine of construing words in *mitiori sensu* has been exploded: *Chaddock v. Briggs*, 13 Mass. 248 [7 Am. Dec. 137]; *Bloss v. Tobey*, 2 Pick. 320; *Demarest v. Haring*, 6 Cow. 76.

If any set of the words charged in any one of the paragraphs demurred to is actionable, the court below ought to have overruled the demurrer to that paragraph.

In the light of the rule above stated, we are of opinion that the demurrers to the first and third paragraphs of the complaint ought to have been overruled. We think some of the

sets of words charged in each of these paragraphs are actionable *per se*, and others are made so by the "aid of the circumstances stated upon the record."

The second, third, fourth, and fifth sets of words in the first paragraph are actionable *per se*, and the first set is made so by the facts alleged.

The fourth, fifth, and eighth sets of words in the third paragraph are actionable *per se*, and the first, second, third, and seventh sets are made actionable by the facts alleged.

In the case of *Peake v. Oldham*, Cowp. 275, Lord Mansfield held, after verdict, that the words, "I am thoroughly convinced that you are guilty; [innuendo that you are guilty of the death of said Daniel Dolly], and rather than you should go without a hangman, I will hang you," were actionable.

In the case of *Ford v. Primrose*, 5 Dowl. & R. 287, 16 Eng. Com. L. 234, it was held by all the judges of the court of king's bench that the words, "I think the present business ought to have the most rigid inquiry, for he [the plaintiff] murdered his first wife; that is, he administered, improperly, medicines to her for a certain complaint, which was the cause of her death," were actionable. Bayley, J., said: "I take it that if a man, by the improper administration of medicines to another, cause his death, that would be manslaughter; and if he administers medicines with an intent to produce death, it would be murder. I think the words declared upon import at least a charge of manslaughter."

In the case of *Gorham v. Ives*, 5 Wend. 536, it was held that if the words spoken in connection with the circumstances of the case leave no reasonable doubt that it was the intention of the defendant to impress upon the mind of the hearers the belief that a forgery had been committed by the plaintiff, an action would lie.

We have not examined with care the second paragraph of the complaint, for the reason that the ground covered by that paragraph is embraced in the third. There can be no available error in sustaining a demurrer to a paragraph where the same matter is charged in another.

This court, in the case of *Drummond v. Leslie*, 5 Blackf. 453, held that although the words laid in a declaration in slander do not contain a directly affirmative charge that the plaintiff had committed forgery, yet if they were calculated to induce the hearers to suspect that the plaintiff had committed it, they are actionable.

The judgment of the circuit court is reversed; cause remanded to said court, with directions to overrule the demurrer to the first and third paragraphs of said complaint, and for further proceedings. Costs here.

WORDS ACTIONABLE PER SE: See *Proctor v. Owens*, 80 Am. Dec. 341, note 343. Words not actionable *per se* may be made so by averring such extrinsic facts as will show that they were intended to be slanderous, and were so understood: *Works v. Stevens*, 76 Ind. 185, citing the principal case.

IN SLANDER, WORDS TO BE TAKEN IN COMMON ACCEPTIONATION: See *Stallings v. Newman*, 62 Am. Dec. 723, note 727, where other cases are collected. Words are to be understood in their plain and natural import according to the ideas they are calculated to convey to those to whom they are addressed; and in ascertaining the meaning of the speaker, reference must be had to the circumstances under which they are uttered: *Blickenstaff v. Perrin*, 27 Ind. 530; *Roe v. Chiswood*, 36 Ark. 215, both citing the principal case. Both judges and jurors are to understand words in that sense which the author intended to convey to the minds of his hearers: *O'Connor v. O'Connor*, 24 Ind. 220, also citing the principal case.

DOCTRINE THAT WORDS MUST BE TAKEN IN MITTORI SENSU has been exploded: See *Stallings v. Newman*, 62 Am. Dec. 723.

THE PRINCIPAL CASE IS CITED IN *Taylor v. Short*, 40 Ind. 506, to the point that where one paragraph of a complaint is good, a demurrer to the whole is rightly overruled.

WESTERN UNION TELEGRAPH Co. v. WARD.

[23 INDIANA, 577.]

TELEGRAPH COMPANY RECEIVING MESSAGE IN ITS OFFICE IS BOUND TO TRANSMIT IT with impartiality and good faith in the order of time in which it is received; and a failure to do so makes the company liable to the person whose dispatch is neglected or postponed. But private dispatches must give way to the transmission of intelligence of general and public interest, and to communications for and from officers of justice.

PARTY IS ENTITLED TO RECOVER OF TELEGRAPH COMPANY PENALTY of one hundred dollars, under the Indiana statute, where he took a message to the company's office, and, after being informed by the agent that it could be transmitted immediately, paid the charges demanded, but the message was not sent until the following morning, when it was too late to be of any service, unless the company shows that, after receiving the message, the same could not be sent by reason of some derangement of the wires, or that it was postponed in consequence of the transmission of intelligence of general and public interest, or of communications for or from officers of justice.

ACTION to recover a penalty. The opinion states the case.

H. W. Chase and J. A. Wilstach, for the appellant.

John A. Stein, for the appellee.

By Court, RAY, C. J. This action was commenced against the appellant, under the first section of "An act to regulate electric telegraph companies" (1 Gavin & Hord, 611), for an alleged violation of its provisions. The section directs that such companies shall, during the usual office hours, receive dispatches, and on payment or tender of the usual charge, according to the regulations of said companies, shall transmit the same with impartiality and good faith, and in the order of time in which they are received, under penalty, in case of failure to transmit, or if postponed out of such order, of one hundred dollars, to be recovered by the person whose dispatch is neglected or postponed. The section also makes provision that messages of a peculiar character shall have preference in the order of transmission. Issues were formed, and the cause submitted to a jury for trial. The finding of the jury was in favor of the appellee, under the instructions of the court. The evidence disclosed the following facts: Certain persons were arrested by military authority in the city of Lafayette, and brought to Indianapolis, on the first day of July. The examination of the parties was postponed until ten o'clock A. M., of the following day, and the appellee, who was their attorney, went at half-past seven o'clock, P. M., with his clients, to the office of the appellant in Indianapolis, and after inquiring of the agent in charge of the office whether the line was in order to Lafayette, and whether a message could be sent at once, and receiving an answer in the affirmative, he prepared a dispatch in these words: "Come on the night train without fail, to testify on behalf of," etc. This message was properly addressed, and the agent informed "that unless the dispatch could go at once, it would be of no use, as the men were wanted to come to Indianapolis by the night train." The agent replied "that the dispatch could be sent immediately, as there were no obstructions, and the lines were all clear." Thereupon the message was delivered, and was accepted upon payment of the charge for sending it. The evidence of the appellant was as follows: At the time the message was received, the book-keeper, whose duty it was to receive dispatches, collect payment for the same, and deliver to one of the operators, was in the office, and not more than one operator was present with him. That operator had left the service of the appellant, and could not be produced as a witness. The next morning, about eight o'clock, the acting manager of the company discovered the dispatch with other messages on

the files, and "saw that it ought to have been sent the evening before, to have enabled the parties to have come by the train as desired," and he then forwarded the message as soon as possible. It was also shown that sometimes messages were delayed, as the operator at the other end of the line was engaged on other lines when called. At that time, the dispatches for the associated press generally commenced coming at eight o'clock, and lasted sometimes a longer and sometimes a shorter time. At the proper time, the following instructions were asked by the appellant: —

"1. This is an action to recover a penalty of one hundred dollars; and in order to entitle the plaintiff to recover he must prove that he deposited with the defendant at Indianapolis, during the usual office hours, the message set forth in the complaint for transmission to Lafayette, and paid or offered to pay therefor; and that the defendant did not, with impartiality and in good faith, and in the order of time in which it was received, transmit the same to Lafayette.

"2. Mere negligence in the transmission of the message, whereby it was delayed from evening until the next morning, unless such negligence was accompanied by bad faith, or unless the message was postponed out of its order, will not entitle the plaintiff to recover in this action, but in such case the company would be liable in the proper action for such damages as her negligence occasioned."

The instructions were refused by the court; and the following instructions were given to the jury, over the exceptions of the appellant: "1. This is an action to recover a penalty of one hundred dollars for an alleged failure to transmit the message, in the complaint specified by the defendants; 2. The law requires of the defendant, where the agents of the telegraph company, in their proper office, receive messages, to transmit the same with impartiality and good faith, and in the order of time in which they are received; and a failure to comply with this requisition makes the company liable to the person whose dispatch is neglected or postponed. Private dispatches must give way, however, to transmission of intelligence of general and public interest; to communications for and from officers of justice. If you shall believe from the evidence that the plaintiff, acting as the attorney of Bixler and Iddings, went to the office of the Western Union Telegraph Company at Indianapolis, with the message in the complaint specified, and inquired of the agent if the same could be sent immediately

to Lafayette, and was informed that it could be immediately, and the plaintiff paid the charges demanded of him by such agent, and the sending of the message was postponed until the next morning, to an hour when it was too late for the message to be of any service, the plaintiff would be entitled to recover the penalty of one hundred dollars, unless the company has shown that, after receiving the message, the same could not be sent by reason of some derangement of the wires, or that the dispatch was postponed in consequence of the transmission of intelligence of general and public interest, or communications for and from officers of justice."

It will be observed that the appellant sought, by the instructions asked, to place the question of her liability before the jury upon the determination of the issue, whether or not she had, with negligence and bad faith, postponed the transmission of the dispatch, or whether she had postponed such message out of its order. The instructions given to the jury presented the question whether or not the message was transmitted the night following its delivery; and declared that if not transmitted then, and such failure was not excused by its lines being out of order, or privileged messages being received, the sending of it in the morning was no transmission, and the company were liable. We are of opinion that the view expressed by the court was correct. The message, upon its face, and as explained at the time of its delivery to the company, could have no force unless sent before the night train left Lafayette. "Come by the night train," as it sounded along the wires the next morning, spoke not as a living voice, but as an echo of the past. Our postal facilities are ample for the transmission of such memories, and the law will not permit the telegraph to be employed as a rival.

The judgment is affirmed, with five per cent damages.

DUTIES AND LIABILITIES OF TELEGRAPH COMPANIES: See *Birney v. New York etc. Co.*, 81 Am. Dec. 607, note 612, where this subject is considered and numerous cases are cited and collected. In Indiana, a penalty may be recovered by a party whose dispatch has not been sent as soon as it should have been: *Western U. T. Co. v. Buchanan*, 35 Ind. 436; *Western U. T. Co. v. Meek*, 49 Id. 56, both citing the principal case. In *Western U. T. Co. v. Gougar*, 84 Id. 178, it was said, citing the principal case, that the statute giving such penalty is beneficial generally, and ought to be fairly enforced.

DUMELL AND WIFE v. TERSTEGGE.

[28 INDIANA, 397.]

MORTGAGE MADE TO SECURE INDEBTEDNESS CONTINUES TO STAND AS SUCH SECURITY, although the note or other paper which evidences the indebtedness may be taken up and other paper of the same party substituted therefor by way of renewal or otherwise. Equity holds the debt as the thing actually intended to be secured, and regards the note as merely the evidence of the debt.

WHERE NOTE PRODUCED DOES NOT CORRESPOND WITH THAT DESCRIBED IN MORTGAGE, either by reason of a misdescription in the mortgage or in consequence of renewal of the paper originally secured, the complaint ought to contain specific averments connecting the note sued on with the mortgage given.

COMPLAINT WHICH ALLEGES THAT DEFENDANT AND WIFE MADE MORTGAGE to secure the payment of a note, and that the note and mortgage are filed with the complaint, is not demurrable, although the note filed with the complaint is executed by the defendant and wife and does not bear interest, while the mortgage describes a note of the same date executed by the defendant alone, bearing interest from date. Such allegation will admit whatever proof may be necessary to show that the note exhibited is the one which was secured by the mortgage.

ACTION to foreclose a mortgage. The opinion states the case.

R. and H. Crawford, for the appellant.

John S. Davis, Thomas L. Smith, and M. C. Kerr, for the appellees.

By Court, **FRAZER, J.** The complaint alleged that the appellants made a mortgage of real estate to secure the payment of a note; that the note, though overdue, was not paid; and that the mortgage and note were filed with the complaint, etc. The note filed appears to be executed by J. Dumell and Ann M. Dumell, and does not bear interest from date. The mortgage describes a note of like date, executed by Jesse Dumell, bearing interest from date.

The defendants filed separate demurrers to the complaint, showing for cause that it did not state sufficient facts. The overruling of these demurrers is the only error assigned.

It is a familiar proposition that a mortgage made to secure an indebtedness continues to stand as such security, though the note or other paper which evidences the indebtedness may be taken up and other paper of the same party substituted therefor, by way of renewal or otherwise. Equity, which regards the substance of things, holds the debt as the thing actually intended to be secured, and regards the note as merely the evidence of the debt. It appears from the re-

citals in this mortgage that Jesse Dumell and Ann M. Dumell, at the date of the note and mortgage, were husband and wife. If so, and the debt was really the husband's, then the note did not bind her, and the mortgage correctly describes it as the note of the husband; for such it would be in legal effect. But the note annexed to the complaint did not bear interest, while that which the mortgage describes did. The argument of the appellant is, that where by misdescription in the mortgage, or in consequence of renewal of the paper originally secured, that which is produced does not correspond with that which the mortgage describes, the complaint ought to contain specific averments connecting the note sued on with the mortgage given. This is undoubtedly correct, but we cannot conceive of any mode by which such averment can be better made than is done in this complaint. It distinctly alleges that the note exhibited is the one which was secured by the mortgage. This allegation would admit whatever proof might be necessary to show that fact. In the case in hand, it may, perhaps, be regarded as the equivalent of an averment that the mortgage by mistake misdescribes the note.

Judgment affirmed, with five per cent damages, and costs.

CONTINUANCE OF MORTGAGE AS SECURITY, NOTWITHSTANDING CHANGES IN FORM OF DEBT. — A mortgage secures a debt or obligation, and not the evidence of it, and no change in the form of the evidence, or in the mode or time of payment, can operate to discharge the mortgage. So long as the debt secured remains unpaid, neither the renewal or substitution of the evidence of the debt will impair the lien of the mortgage: 2 Jones on Mortgages, sec. 924; *Cullum v. Branch Bank at Mobile*, 23 Ala. 797; *Boyd v. Beck*, 29 Id. 703; *McGuire v. Van Pelt*, 55 Id. 344; *Helmetag v. Frank*, 61 Id. 67; *Kieser v. Baldwin*, 62 Id. 526; *Olyphint v. Eckerley*, 36 Ark. 69; *Franklin v. Cannon*, 1 Root, 500; *Bolles v. Chauncey*, 8 Conn. 389; *Huguin v. Starkweather*, 5 Gilm. 492; *Hamilton v. Quimby*, 46 Ill. 90; *Rogers v. Trustees of Schools*, 46 Id. 428; *Dart v. Bates*, 51 Id. 439; *Flower v. Elwood*, 66 Id. 438; *Tennery v. Nicholson*, 87 Id. 464; *Worcester National Bank v. Cheeney*, 87 Id. 602; *Citizens' National Bank v. Dayton*, 116 Id. 257; *McCormick v. Digby*, 8 Blackf. 99; *Cisma v. Haines*, 18 Ind. 496; *Mayer v. Grottenpick*, 68 Id. 1; *Walters v. Walters*, 73 Id. 425; *Bodkin v. Merit*, 86 Id. 560; *Powder v. Rittinger*, 102 Id. 571; *Port v. Robbins*, 35 Iowa, 208; *Sloan v. Rice*, 41 Id. 465; *Heively v. Matteson*, 54 Id. 505; *Hadlock v. Bulfinch*, 31 Me. 246; *Smith v. Stanley*, 37 Id. 11; *Parkhurst v. Cummings*, 56 Id. 155; *Maryland etc. Co. v. Wingert*, 8 Gill, 170; *Watkins v. Hill*, 8 Pick. 522; *Pomroy v. Rice*, 16 Id. 22; *Boater v. McIntire*, 13 Gray, 168; *Taber v. Hamlin*, 97 Mass. 489; *Brown v. Duncas*, 46 Mich. 29; *Whitacre v. Fuller*, 5 Minn. 508; *Heard v. Evans*, 1 Freem. Ch. 79; *Morse v. Clayton*, 13 Smedes & M. 373; *Gleason v. Wright*, 53 Miss. 247; *Howell v. Bush*, 54 Id. 437; *Sledge v. Obenchain*, 58 Id. 670; *Thornton v. Irwin*, 43 Mo. 153; *Christian v. Newberry*, 61 Id. 446; *Elliot v. Sleeper*, 2 N. H. 525; *Hutchinson v.*

Swartsweller, 31 N. J. Eq. 206; *Humphreys v. Dancer*, 32 Id. 221; *Swain v. Frazier*, 35 Id. 326; *Gregory v. Thomas*, 20 Wend. 17; *Cole v. Sackett*, 1 Hill, 516; *Bank of Utica v. Finch*, 3 Barb. Ch. 293; S. C., 49 Am. Dec. 175, note 178; *Babcock v. Morse*, 19 Barb. 140; *Hill v. Beebe*, 13 N. Y. 556; *Jagger Iron Co. v. Walker*, 76 Id. 521; *Hyman v. Devereaux*, 63 N. C. 624; *Kidder v. McIlhenney*, 81 Id. 123; *Vick v. Smith*, 83 Id. 80; *Patterson v. Johnston*, 7 Ohio, pt. 1, p. 225; *Chateau v. Thompson*, 3 Ohio St. 424; *Nightingale v. Chaffee*, 11 R. I. 609; *Burton v. Pressly*, 1 Cheves Eq. 1; *Bank of South Carolina v. Rose*, 1 Strob. Eq. 257; *Dana v. Binney*, 7 Vt. 493; *McDonald v. McDonald*, 16 Id. 630; *Dunshoe v. Parmelee*, 19 Id. 172; *Slocum v. Catlin*, 22 Id. 137; *Seymour v. Darrow*, 31 Id. 122; *Farmers' Bank v. Mutual Assurance Society*, 4 Leigh, 69; *Coles v. Withers*, 33 Gratt. 186; *Williams v. Starr*, 5 Wis. 534; *Ames v. New Orleans etc. R. R. Co.*, 2 Woods, 206; *Teed v. Carruthers*, 2 Younge & C. 31. Nothing but payment or a release will have the effect of discharging the mortgage: *Parkhurst v. Cummings*, 56 Me. 155; *Whittacre v. Fuller*, 5 Minn. 608; *Heard v. Evans*, 1 Freem. Ch. 79; *Morse v. Clayton*, 21 Miss. 373; *Schumpert v. Dillard*, 55 Miss. 348; *Lippold v. Held*, 58 Mo. 213; *Rogers v. Traders' Ins. Co.*, 6 Paige, 583. In *Bolles v. Chauncey*, 8 Conn. 392, Bissell, J., delivering the opinion of the court, said: "As between the mortgagor and the mortgagee, there can be no pretense for saying that the substitution of one note for another is a satisfaction of the condition of the mortgage." And in *Oullum v. Branch Bank at Mobile*, 23 Ala. 800, Goldthwaite, J., who delivered the opinion of the court, said: "The debt was the same, although it was evidenced by a new note; and equity, in such cases, looks to the debt, and not to the shape it may assume." The renewal of a note secured by mortgage is not payment thereof; neither is the substitution of a new note for the old one; and in the absence of some agreement, or plain manifestation of a contrary intention, the security will remain intact: *Olyphint v. Eckerley*, 36 Ark. 69; *Bolles v. Chauncey*, 8 Conn. 389; *Walkins v. Hill*, 8 Pick. 622; *Pomroy v. Rice*, 16 Id. 22; *Brown v. Dunkel*, 46 Mich. 29; *Hutchinson v. Swartsweller*, 31 N. J. Eq. 206; *Swain v. Frazier*, 35 Id. 326; *Vick v. Smith*, 83 N. C. 80; *Bank of South Carolina v. Rose*, 1 Strob. Eq. 257; *Burton v. Pressly*, Cheves Eq. 1; *Coles v. Withers*, 33 Gratt. 186; *Dunham v. Dey*, 15 Johns. 554; S. C., 8 Am. Dec. 282; *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; S. C., 8 Am. Dec. 538. If a new note is given, the burden is upon the mortgagor to show an agreement that the mortgage should be released upon the execution of the new note: *Sloan v. Rice*, 41 Iowa, 465; *Coles v. Withers*, 33 Gratt. 186. The admission of parol evidence to show that at the time the new note was executed it was agreed by the parties that the mortgage should be continued as security for the new note, is not a violation of the rule respecting the admission of parol evidence: *Port v. Robbins*, 35 Iowa, 208.

A mortgage given to secure a certain sum, according to the condition of a certain bond of the same date, and which bond was conditioned to pay that sum, or indemnify the mortgagee against a note for the same sum made by the mortgagor, and indorsed by the mortgagee, and discounted at a bank for the accommodation of the mortgagor, will continue as a subsisting and valid security as long as such note shall run, or be kept alive in the bank, in whole or in part, by renewals thereof from time to time, according to the customary course of such transactions with the bank: *Brinckerhoff v. Lansing*, 4 Johns. Ch. 65; S. C., 8 Am. Dec. 538. But in *Fowler v. Bush*, 21 Pick. 230, a mortgage was given to secure a note payable in installments, and when one of the installments became due, the mortgagor gave to the mortgagee another note for the sum due, which he had discounted at a bank, and the new note was

held to be a payment of the first installment, and not a mere change of security, and that the mortgage was discharged *pro tanto*.

It is not necessary to constitute subsequently issued notes renewals of the original notes that they should be issued for the same amounts, and that each successive note should have been applied to take up its immediate predecessor. A continuing loan of the same credit by the issue of new notes from time to time is within the terms of the mortgage, and such notes will be secured by it: *Gault v. McGrath*, 32 Pa. St. 392. Where an old note which has been paid in part is taken up and a new note given for the balance, the mortgage remains security for the new note, and will operate as a lien on the premises so long as any portion of the debt which it was given to secure remains unpaid: *McCormick v. Digby*, 8 Blackf. 99; *Cisena v. Haines*, 18 Ind. 496; *Walters v. Walters*, 73 Id. 425; *Chase v. Abbott*, 20 Iowa, 154; *Sims v. Hammond*, 33 Id. 368; *Swan v. Yapple*, 35 Id. 248; *Sloan v. Rice*, 41 Id. 485; *Mackell v. Eichelberger*, 12 Md. 78; *New Hampshire Bank v. Willard*, 10 N. H. 210; *McDonald v. McDonald*, 16 Vt. 630; *Dunshes v. Parmelee*, 19 Id. 172; *Seymour v. Darrow*, 31 Id. 122. Extending the time of payment does not destroy the lien of the mortgage: *Nalmer v. Tappey*, 55 Ind. 107; *Cleveland v. Martin*, 2 Head, 128; *Williams v. Starr*, 5 Wis. 534. The taking of a new note with personal security instead of an old one without security does not release the mortgage, unless it was so intended: *Flower v. Elwood*, 66 Ill. 439; *Burdett v. Clay*, 8 B. Mon. 287. Where an agreement is executed in lieu of a note secured by mortgage, the mortgage is not thereby canceled, where it is manifest that the parties intended that the mortgage should still remain a subsisting security for the payment of the debt: *Hugwin v. Starkweather*, 5 Gilm. 492. And a mortgage given to indemnify an indorser or surety on a note secured by it is a continuing security for all renewals, until it is finally paid: *Mayer v. Grottenidick*, 68 Ind. 1.

If the holder of a promissory note indorses it to a third person, and gives the latter a mortgage to secure the payment of the note, the mere failure of the mortgagee to charge the indorser upon the note by presentment and notice of non-payment, will not release the land from the burden of the mortgage. To produce that effect, there must have been, in addition to the failure to charge the indorser upon the note, such conduct on the part of the mortgagee as would prevent or hinder the mortgagor from collecting the note of the maker: *Hilton v. Catherwood*, 10 Ohio St. 109; *Mitchell v. Clark*, 35 Vt. 104. The taking up of an old note secured by mortgage and having an indorser, and giving a new one without an indorser, does not release the premises from the lien of the mortgage: *Daret v. Bates*, 51 Ill. 439. But where a wife mortgages her land as continuing security for notes to be indorsed by her husband, or any renewals thereof, an agreement by the creditor to extend the time of payment for the debt due upon such notes, without a renewal thereof, discharges her liability as surety: *Smith v. Townsend*, 25 N. Y. 479; *Bank of Albion v. Burns*, 46 Id. 170. The taking up of an old note secured by mortgage, and giving instead a new one in which is incorporated an additional sum loaned, will not, in the absence of an agreement to the contrary, discharge the mortgage: *Port v. Robbins*, 35 Iowa, 208; *De Cottes v. Jeffers*, 7 Fla. 284. In the latter case, the mortgagor gave his note, secured by the mortgage, for two thousand dollars. After it had been reduced by payments to eight hundred dollars, he secured a further loan of two hundred dollars from the mortgagee, representing that this sum was necessary to enable him to carry on his business. A new note for one thousand dollars was then executed. It was objected on the argument of the case that this advance and con-

solidation constituted a new contract, and that the mortgage had been fully discharged; but the court held that however that might be between parties not privy to the contract, the objection would not hold as between the original parties to the mortgage. The merger into a judgment at law, of a note secured by mortgage, does not extinguish the lien of the mortgage. The mortgage can only be extinguished by the payment of the debt: *Vansant v. Allmon*, 23 Ill. 30; *Hamilton v. Quimby*, 46 Id. 90; *Hewitt v. Templeton*, 48 Id. 367; *Priest v. Wheelock*, 58 Id. 114; *Rockwell v. Servant*, 63 Ill. 424; *Flower v. Rhoad*, 66 Id. 438; *Markle v. Rapp*, 2 Blackf. 268; *Applegate v. Mason*, 13 Ind. 75; *Hensicker v. Lamborn*, 13 Id. 468; *O'Leary v. Snediker*, 16 Id. 404; *Cisna v. Haines*, 18 Id. 496; *Lapping v. Duffy*, 47 Id. 51; *Teal v. Hinckman*, 69 Id. 379; *Wahl v. Phillips*, 12 Iowa, 81; *State v. Lake*, 17 Id. 215; *Hendershott v. Ping*, 24 Id. 134; *Jordan v. Smith*, 30 Id. 500; *Jewett v. Hamlin*, 68 Me. 172; *Cary v. Prentiss*, 7 Mass. 63; *Ely v. Ely*, 6 Gray, 439; *Torrey v. Cook*, 116 Mass. 163; *Terry v. Woods*, 14 Miss. 139; *Riley v. McCord*, 21 Mo. 285; *Thornton v. Pigg*, 24 Id. 249; *Flanagan v. Westcott*, 11 N. J. Eq. 264; *Builer v. Miller*, 1 N. Y. 496; *Gage v. Brewster*, 31 Id. 218; *Stackpole v. Robbins*, 48 Id. 665; *Helmbold v. Man*, 4 Whart. 410; *Davis v. Battine*, 2 Russ. & M. 76; 2 Jones on Mortgages, sec. 936. Walker, J., delivering the opinion of the court in *Priest v. Wheelock*, 58 Ill. 116, said: "That instrument was given to secure the debt; and it was immaterial what form it assumed, whether an account, note, or judgment. The substance, and not the mere form, is regarded in equity, and hence the pledge was to secure payment of the money, and not the mere extinguishment of the note by the debt assuming another form. Because the judgment extinguished the note, it does not follow that the mortgage was discharged, or the lien it created on the premises was extinguished. The lien of the mortgage on the lot still continued, to secure the payment of the debt then evidenced by the judgment. The sum recovered was the same debt for which the security was created by the mortgage, and it remained in force and bound the lot for the payment of the judgment precisely as it did for the payment of the note. Until the satisfaction of the judgment by payment, release, or otherwise, or by its becoming barred by the statute of limitations or some superior lien, the mortgage bound the property, and could be enforced.

A mortgagee who has taken the body of his debtor in execution for the mortgage debt is nevertheless entitled to the benefit of his mortgage security: *Davis v. Battine*, 2 Russ. & M. 76; *Cary v. Prentiss*, 7 Mass. 63. And where the assignee of a note secured by mortgage sues the debtor and has him arrested on meane process, but out of clemency on his inability to give bail, discharges him from the arrest, the mortgage lien is not thereby divested or taken away: *Terry v. Woods*, 14 Miss. 139.

Where a mortgage is given to secure the payment of a sum of money due on a promissory note, and the mortgagee afterwards accepts a recognizance for the sum due, and the note is given up, this does not discharge the mortgage: *Davis v. Maynard*, 9 Mass. 242. And if a bond bearing interest at six per cent is given up without any intention to abandon the lien of the mortgage, and a new bond bearing eight per cent is given in its stead, the lien will remain, but only for the debt and six per cent interest thereon: *McDonald v. Hulse*, 16 Mo. 503.

A second mortgage and note taken upon the same land for the same debt without a surrender and discharge of the first mortgage and note, will not release the first mortgage, unless there is an understanding to that effect. The new mortgage is presumed to be a further security for the same debt:

2 Jones on Mortgages, sec. 925; *Ossna v. Haines*, 18 Ind. 496; *Walters v. Walters*, 73 Id. 425; *Pouder v. Rittinger*, 102 Id. 571; *Schumperi v. Dillard*, 55 Miss. 348; *Hutchinson v. Swartsweiller*, 31 N. J. Eq. 206; *Gregory v. Thomas*, 20 Wend. 17; *Jones v. Parker*, 51 Wis. 218. It will be otherwise, however, if the new note and mortgage are taken as a payment and satisfaction of the first: *Walters v. Walters*, 73 Ind. 425; *Childs v. Stoddard*, 130 Mass. 110; *St. Albans Trust Co. v. Farrar*, 53 Vt. 542. So the giving of one's own note in discharge of a debt, evidenced by an existing note, is a good payment thereof if it has been so received by the party entitled to payment, and a mortgage executed to secure such existing note will be thereby satisfied: *Iowa County v. Foster*, 49 Iowa, 676. When, upon renewing a note, the mortgage securing it is canceled, and a new one executed upon the same property, the lien of the second mortgage dates only from its execution, as against one who, without actual notice of any claim to the contrary, purchases the property under a judgment which was a lien prior to the date of such execution: *Washington County v. Slaughter*, 54 Id. 265. Where a note secured by a chattel mortgage is destroyed, and a new note given in its stead, secured by a new deed of trust upon the property to a new trustee, the lien of the new deed, if it is duly accepted and recorded, takes effect as to third persons from its date only: *Hechtman v. Sharp*, 3 McAr. 90. Where, in place of a bond secured by mortgage for the payment of fifteen hundred dollars, in three yearly payments, to a third person after the death of the mortgagee, a due-bill of the mortgagor, payable to the mortgagee, at a different date, is substituted by parol agreement some time after the giving of the mortgage, the lien of the mortgage will not be held to cover such due-bill, in the absence at least of a clear showing that such was the agreement when the exchange was effected: *Tucker v. Alger*, 30 Mich. 67. And where a party having a note secured by mortgage, after the institution of proceedings in bankruptcy by him against the maker, enters into an agreement with the other creditors of the maker to dismiss the proceedings in bankruptcy and to take a new note payable in two years from date, without interest, in the absence of proof of the intention of the parties, the taking of such new note will operate as a release of the mortgage: *Jarnagan v. Gaines*, 84 Ill. 203. And where a mortgagee surrenders the old papers and takes a new mortgage for five hundred dollars less than the amount of the old one, bearing interest at a different rate, with one of the old mortgagors left out and a new one inserted in his stead, very clear evidence will be required to induce a court of equity to interfere and give the mortgage priority over intervening liens: *Dingman v. Randall*, 13 Cal. 512. A decree for the foreclosure of a mortgage extinguishes the lien of the mortgage, although such decree is merely enrolled and not docketed: *People v. Beebe*, 1 Barb. 379.

WILSON v. LEMON.

[23 INDIANA, 423.]

INDIANA STATUTE PRESCRIBING DEGREE OF CREDIBILITY TO BE ATTACHED TO AUDITOR'S DEED OF land sold for taxes, and its recital, does not preclude the introduction of evidence to show non-compliance with positive statutory requirements in reference to the steps necessary to vest in him the power to sell.

ACTION to quiet title. The opinion states the case.

John B. Niles, for the appellant.

Bradley and Woodward, for the appellee.

By Court, GREGORY, J. Wilson sued Lemon in an action in the form of a bill to quiet title to certain real estate. He averred that he was the owner (setting forth his title), and that Lemon held a tax deed, and pretended to claim title under it (setting it forth), and that it was invalid for various alleged causes. Issues were made; trial by the court, and special finding of facts placed upon the records, and conclusions of law thereon; upon which a judgment was rendered for the defendant. The finding was as follows:—

“1. That the lot in controversy was sold for taxes in the year 1847, and that on the twenty-first day of February, 1850, a deed was executed by the auditor of Laporte County to the defendant, on the surrender of the certificate of purchase given on the sale.

“2. The court finds that the list of taxes taken by the county auditor from the duplicate in the hands of the treasurer, which the said treasurer was unable to collect at their annual settlement, in the year 1846, was not signed by the treasurer, nor sworn to by him, as required by the laws of 1843, or of any law; but that it was proved by the oath of said treasurer on the trial that said list was correct.

“3. The court finds that the said sale for taxes was advertised for four weeks before the twenty-fifth day of December, 1846, but the date of the advertisement is not shown by any book or record in said auditor's office.

“4. The court finds that on said list taken by the auditor from the treasurer's duplicate, no reason was noted by the auditor why the tax on the lot in controversy could not be collected as required by the laws of 1843, or of any other year.

“On the above facts the court holds the law to be, that the auditor's deed was conclusive evidence of title, and could not be impeached, and therefore that the evidence showing that the treasurer did not sign and swear to said delinquent list, and that the auditor did not note on said list the reason why said tax was not collected, or that the sale was not legally advertised, were irrelevant.

“The court also holds that those irregularities, had the proof of them been relevant to the case, would have been

sufficient to defeat the title under the tax sale. The court finds for the defendant."

The latter conclusion above quoted resulted, we suppose, from a consideration of numerous decisions which have been made, in reference to various *ex parte* proceedings, ministerial and judicial, by which the title to lands has been transferred, or attempted to be transferred, from one person to another.

Preliminary to an examination of the controlling conclusion arrived at in this case upon the facts found, we will advert for a moment to some of the decisions above alluded to.

In proceedings in attachment it has been held: 1. In *O'Brien v. Daniel*, 2 Blackf. 290, as the affidavit did not state that the defendant was late of the county, in accordance with the statute, that therefore the judgment was wrong; and the court say: "The *ex parte* nature of these proceedings requires a strict compliance with every statutory requisition."

So in *Leach v. Swann*, 8 Blackf. 68, it did not appear whether the person who assisted the sheriff in making an inventory and appraisal of the property, etc., was a householder of the county, as required by the statute. It is said it should have been shown "that the requirements of the statute had been strictly complied with."

So in *Marnine v. Murphy*, 8 Ind. 274, it was held that as the statute required the bond to be in double the sum claimed, the judgment was erroneous, the bond being in the sum of \$780, and the claim for \$392. It is said: "Proceedings in attachment being *ex parte*, great strictness is required. The judgment in such cases will be reversed for small deviations from the statute."

So in *Willeys v. Ridgway*, 9 Ind. 368, it was held that the sheriff's return to a writ was insufficient, because it did not show that search had been made for personal property, and none found, or if found taken, in view of the statute which required that "personal property shall be first taken," etc.

So in *Porter v. Byrne*, 10 Ind. 147 [71 Am. Dec. 305], a sheriff's return was held insufficient, and a sale under it void, where it stated the levy on the half of a lot, without stating which half, and that parol evidence was not admissible to show which half, etc., on the ground that "the proceedings in attachment are matters of record, and where the law requires an entry to be made in a court of justice of particular transactions, the official entry excludes all independent evidence of the transaction."

The question presented by the finding of the court is, whether our statute, in reference to the degree of credibility to be attached to the auditor's deed, and its recitals as evidence, is such as to preclude the introduction of evidence to show non-compliance with positive statutory requirements, or to change the current of decision on such *ex parte* proceedings. The point is not as to whom the burden of proof is upon to show such non-compliance, but whether such proof is relevant at all.

The statute in force at the time of this sale is as follows: "Such conveyance shall be executed by the county auditor, under his hand and seal, and the execution thereof shall be witnessed by the county treasurer, and shall be *prima facie* evidence that the sale was regular, and of good title in such grantee, his heirs and assigns, according to the provisions of this chapter: R. S. 1843, p. 227, sec. 115.

In the case of *Wiggins v. Holley*, 11 Ind. 2, this court held that a claimant under a tax title must prove that all the requirements of the statute have been complied with.

The statute under which this decision was made provided that "the said collector or his successor shall, after the expiration of the said two years, execute to the said purchaser, his heirs or assigns, in the name of the state of Indiana, a conveyance of the lot or tract of land, so sold as aforesaid, and mentioned in said certificate, which conveyance shall vest in the person to whom it is given an absolute estate in fee-simple, subject to the claims of the state or county for all taxes, costs, and charges accrued upon such lot or tract of land after such sale as aforesaid; and such conveyance shall be conclusive evidence that the sale was regular, according to the provisions of this act": R. S. 1824, p. 344, sec. 12.

The steps necessary to vest the power of sale in the collector, it seems, must be proven *aliunde* the deed of conveyance: See *Parker v. Smith*, 4 Blackf. 70; *Doe ex dem. Morris v. Himelick*, 4 Id. 494.

At all events, the special findings of fact of the judge below are relevant. If we were to hold otherwise, it would reverse almost the entire series of decisions of this court in tax-title cases.

It is claimed that the general finding for the defendant must stand, notwithstanding the special findings, for the reason that the plaintiff's title is not found; but we think that the finding "for the defendant" was intended by the judge to be the corollary of the special finding.

The judgment of the circuit court is reversed; cause remanded for a new trial, in accordance with this opinion. Costs here.

RECITALS IN TAX DEED AS EVIDENCE: See *Long v. Burnett*, 81 Am. Dec. 420, note 427; *Pleasant v. Scott*, 76 Id. 403, note 406, where other cases are collected. The principal case is approved generally in *Whisnand v. Small*, 65 Ind. 127, and it is cited in *Keppfer v. Force*, 86 Id. 85, to the point that notwithstanding the provision in the Indiana statute of 1824, that "such conveyance shall be conclusive evidence that the sale was regular according to the provisions of this act," the steps necessary to vest the power of sale in the collector, it seems, must be proven.

WILLIAMSON v. FOREMAN.

[28 INDIANA, 540.]

ANSWER SETTING UP FORMER ADJUDICATION MUST BE ACCOMPANIED BY COMPLETE RECORD of all the pleadings and proceedings in the case upon which it is founded, and if it fails to do this, the defect may be reached by demurrer.

ACTION on an account. The opinion states the case.

J. C. Denny, for the appellant.

By Court, **ELLIOTT, J.** Suit by Williamson on an account assigned to him by one Alfred Elliott against George Foreman, Gabriel Foreman, Columbus Foreman, and Ferdinand Foreman, partners, trading, etc., in the name of George Foreman and Company. Elliott was also made a party defendant to answer as to his interest in the account sued on. There were issues of fact; jury trial; verdict and judgment for the plaintiff for one dollar. The plaintiff appeals.

The only error assigned is the overruling of a demurrer to the fourth paragraph of the answer by the court below. That paragraph of the answer is pleaded by the defendants Foreman, and alleges that on the twenty-second day of August, 1860, in a suit then pending in the Knox circuit court, and then tried and determined, in which Gabriel Foreman, assignee of G. Foreman and G. W. Foreman and Company, was plaintiff, and the defendant Elliott and George W. Foreman were defendants, the matters and things in plaintiff's complaint, and the several items of the plaintiff's bill of particulars, now by the plaintiff pleaded by way of set-off to the plaintiff's complaint, were then and there fully adjudicated, heard and determined, and the plaintiff in said action then

and there, by the judgment of said court, recovered against said defendants, which said judgment remains in full force, etc., "a copy of which is filed herewith; wherefore," etc.

The copy of the record filed with the answer is as follows:—

"*Gabriel Foreman v. Alfred Elliott*. Now came the parties, by their attorneys, and the court being sufficiently advised, overruled the motion for a new trial, to which ruling of the court, in overruling the motion for a new trial, the defendant at the time excepts. And thereupon the defendant moves the court to arrest the judgment on the verdict of the jury, which motion was also overruled by the court, and to the ruling of the court in overruling the motion in arrest of judgment, the defendant excepts. It is therefore, on motion, ordered, adjudged, and decreed by the court that the plaintiff recover of the defendant the sum of \$182, as also the costs and charges herein, amounting to the sum of \$——."

There is no certificate of the clerk attested.

The answer attempts to set up in bar of the action that the subject-matter thereof had been fully litigated in a prior suit in the Knox circuit court; it is founded on the record of that suit, and therefore a copy of such record should be made part of the answer: 2 *Gavin & Hord*, 104, sec. 78; *Norris v. Amos*, 15 Ind. 365; *Ringle v. Weston*, 23 Id. 588.

The defect may be reached by demurrer: *Peoria Marine and Fire Ins. Co. v. Walser*, 22 Ind. 73, and authorities there cited.

The paragraph of the answer under consideration is clearly bad. Aside from any question that may arise as to whether the suit in the circuit court was between the same parties or privies, or as to the want of sufficient identification in the complaint of the paper produced as a copy of the record, under the ruling in the case of *Peoria Marine Fire Ins. Co. v. Walser*, 22 Ind. 73, it is bad, because it should have been accompanied with a complete record of all the pleadings and proceedings in the case upon which it is founded, and especially of the alleged set-off or defense in that case, which is claimed to have embraced the same matters now sued on: *Ashley v. Laird*, 14 Id. 222.

The demurrer should have been sustained.

Judgment reversed, with costs; cause remanded for further proceedings not inconsistent herewith.

DEFECTIVE DECLARATION SHOULD BE TAKEN ADVANTAGE OF BY DEMURRER: See *Beale v. Olmstead*, 58 Am. Dec. 150, note 153, where other cases are collected. Where a pleading is founded upon a written instrument, the original

or a copy must be filed with it, and if it is not so filed the defect may be reached by demurrer: *Stafford v. Davidson*, 47 Ind. 321; *Cook v. Hopkins*, 66 Id. 209, both citing the principal case. In *Mull v. McKnight*, 67 Id. 528, the principal case is said to have been impliedly overruled in *Lytle v. Lytle*, 37 Ind. 281, and other subsequent cases, so that it is now a well-settled rule of practice in Indiana that a judgment does not constitute a "written instrument" within the meaning of the code requiring copies of written instruments to be filed with the pleadings founded upon such instruments. The ruling in *Snyder v. Snyder*, 25 Id. 401, was said not to be in conflict with the principal case.

OHIO AND MISSISSIPPI R. R. CO. v. DAVIS.

[28 INDIANA, 558.]

RAILROAD COMPANY, WHOSE ROAD WITH ALL ITS APPURTENANCES IS IN EXCLUSIVE POSSESSION, USE, AND CONTROL OF RECEIVER, who has power to employ, control, and dismiss all the agents, servants, and employees engaged on the road, is not liable for an injury resulting from the negligence of such agents or servants.

IN ACTION AGAINST CORPORATION FOR DAMAGES RESULTING FROM ITS NEGLIGENT ACT, evidence tending to show that the persons who committed the wrong were not the agents or employees of the corporation is relevant and material.

POSSESSION OF RAILROAD BY RECEIVER APPOINTED BY COURT cannot be regarded as the possession of the railroad company.

AVERTMENT OF COMPLAINT IN ACTION AGAINST RAILROAD COMPANY FOR DAMAGES resulting from the negligence of its agents and servants, that the defendant ran its train with carelessness and gross negligence, is good on demurrer.

ACTION to recover damages. The opinion states the case.

Theodore Gazlay, Carter Gazlay, and Malott and Cobb, for the appellant.

James Collins and Gideon Putnam, for the appellee.

By Court, RAY, C. J. This action was originally brought by the appellee in the Lawrence circuit court, to recover damages for injuries sustained by him, resulting, it is alleged, from a collision with rolling stock of the appellant, under the management of her hands. The complaint avers "that he [appellee] was passing the track of said road with necessary care, at the usual and known place of crossing, and while he was passing said track, the said defendant, with carelessness and with gross negligence, and without giving any warning whatever, caused one of her engines to run upon said track with great speed, and without any signal whatever, and the said appellee being on such track, crossing the same with his

cattle and carriage, and said engine, so carelessly and without signal run as aforesaid, was caused to come into collision, etc., and without any fault on his part; whereby," etc.

The action was subsequently transferred, upon the affidavit and motion of appellant, to the Orange circuit court. To the complaint, a demurrer was filed, which was overruled by the court, and an exception reserved.

It is insisted that negligence is not sufficiently charged against the appellant. In our opinion, the ruling of the court upon the demurrer was right. The charge is, that the appellant ran the train with carelessness and with gross negligence. Answers were filed in several paragraphs, among which was the general denial. The bill of exceptions shows that on the trial of the cause the appellant offered in evidence a transcript of a record of the United States circuit court, for the district of Indiana, and the depositions of Theodore Gazlay and Alexander H. Lewis, all of which were so offered for the purpose of showing, under the general denial, that at the time of the committing of the alleged grievances, the appellant's railroad was not in her possession, or in any manner under her control; that she did not employ, pay, or in any manner control the hands, servants, or agents engaged upon the road in the running of trains, or in any other capacity, and that the servants who are charged with having committed said injury were not the servants of the company, or in any manner under her control; but the railroad and all its appurtenances and dependencies were in the exclusive possession, use, and control of one Joseph W. Alsop, a receiver appointed by the United States circuit court for the district of Indiana, and that he had the employment and control of all the hands, agents, and servants engaged upon the railroad or about the business thereof.

The appellee objected to the introduction of this evidence, on the ground that it was irrelevant and immaterial, and the court sustained the objection.

The complaint charges that the injury to the appellee resulted from the gross negligence of the appellant in the management of the train. This was a material averment, and unless sustained by proof, the plaintiff below cannot recover in this cause.

The action is for damages resulting from the negligent act of a corporation; but the corporation could do no act save by its agents and servants, and proof which tended to show that the persons who committed the wrong were not the agents or

employees of the corporation would seem to be relevant and material.

This court held, in the case of *Crockett v. Calvert*, 8 Ind. 127, where A hired his wagon, team, and teamster to B, and during the bailment the team ran away, and ran against C's horse, injuring him so that he died, that the teamster was the servant of the bailor and not of the bailee, and the bailor was the party liable for the injury. The decision rested upon the authority of *Quarman v. Burnett*, 6 Mees. & W. 497, in which case Baron Parke, in delivering the opinion of the court, makes use of the following language: "Upon the principle that *qui facit per alium facit per se*, the master is responsible for the acts of his servant; and that person is undoubtedly liable who stands in the relation of master to the wrong-doer; he who selected him as his servant, from the knowledge or belief in his skill and care, and who could remove him for misconduct, and whose orders he was bound to receive and obey. And no other person than the master of such servant can be liable, on the simple ground that the servant is the servant of, and his act the act of, another." This case overruled *Bush v. Steinman*, 1 Bos. & P. 404, which has never been recognized as authority in this state.

The above decision was fully approved and the same principles recognized in the cases of *Rapson v. Cubitt*, 9 Mees. & W. 710; *Hobbitt v. North-western R'y Co.*, 4 Ex. 254; *Reedie v. London and North-western R'y Co.*, 4 Id. 244; *Knight v. Fox*, 5 Id. 721; *Overton v. Freeman*, 11 Com. B. 867; *Peachy v. Rowland*, 13 Id. 182; *Sadler v. Henlock*, 30 Eng. L. & Eq. 167; *Steel v. South-eastern R'y Co.*, 32 Id. 366; *Scott v. Mayor etc.*, 38 Id. 477.

The rule, so well considered and clearly established in England, has been followed very generally in this country. The case of *Blake v. Ferris*, 5 N. Y. 48 [55 Am. Dec. 804], applies the rule, where certain persons were permitted to construct a public sewer at their own expense, and employed another person to do it at an agreed price for the whole work, they were held not liable for injury resulting from the negligence of the contractors. The same court have again recognized the rule in *Stevens v. Armstrong*, 6 Id. 435; *City of Buffalo v. Holloway*, 8 Id. 493 [57 Am. Dec. 550]; *Pack v. Mayor etc. of New York*, 4 Id. 222; *Kelly v. Mayor etc.*, 11 Id. 432; *O'Rourke v. Hart*, 7 Bosw. 511. The supreme court of Massachusetts, in the case of *Hilliard v. Richardson*, 3 Gray, 349 [63 Am. Dec.

743], after a careful review of the decisions, announce the law as thus settled by the weight of authority.

The decision in *De Forrest v. Wright*, 2 Mich. 368, is to the same effect. This is also the case of *City of Cincinnati v. Stone*, 5 Ohio St. 38; the same ruling was had in the case of *Painter v. City of Pittsburg*, 46 Pa. St. 213.

In the case of *Althorf v. Wolfe*, 22 N. Y. 355, it was held that while the owner of fixed property is in general responsible, that it be so used as that others receive no injury, still he may absolve himself under some exception, as that the offender was there despite of due care to exclude negligent persons by superior force, or in the employment of a third person having temporary control. That the same rule holds in regard to real and personal property, was decided in *Reedie v. London and North-western R'y Co.*, 4 Ex. 244, and *Simons v. Monier*, 29 Barb. 419, except, perhaps, in the single instance where the act complained of in regard to real estate amounts to a nuisance.

In *Weyant v. New York and Harlem R. R. Co.*, 3 Duer, 360, the rule was applied to a case somewhat analogous to the one now under consideration. "Weyant was thrown out of his wagon and injured in Canal Street by a car which belonged to the New Haven Railroad Company, but the horses which drew it, and the driver who was driving it, were in the employ of the defendants, the Harlem Railroad Company. The sole question which arose was, whether the Harlem Railroad Company or the New Haven Railroad Company was liable." It was held that the Harlem Railroad Company was liable. In *Fletcher v. Boston and Maine R. R. Co.*, 1 Allen, 9 [79 Am. Dec. 695], the court held the railroad company responsible for an injury occasioned by a want of proper care and prudence on the part of its servants in the management of a train which was under their exclusive care and control, although the trains belonged to another company, and decided that it was immaterial who in fact were the owners of the engine and cars constituting the train. "This must be so, for if a wrong was done, it was by those who had the exclusive direction and control of the train at the time, and no others." It was also decided in that case "that if such injury results from the negligence of another railroad company which has a joint right with the defendants to use the defendant's track, under a lease from the defendants, and which is accordingly running trains over the defendant's road on its own account, the de-

fendants are not responsible in this action." This decision of a court of eminent judicial learning is entitled to grave consideration.

The ruling of the supreme court of Vermont, in *Felton v. Deall* 22 Vt. 170 [54 Am. Dec. 61], has been repeatedly relied upon in later cases in other states. There, the defendant being the owner of a farm and ferry, leased them by parol to one H. for the term of one year, upon certain conditions, among which it was provided that the profits and proceeds of the farm should be divided equally between the defendant and the lessee; that the lessee should keep and manage the ferry at his own expense and labor, the defendant to put the boat in good order at the commencement of navigation, and the expense of subsequent repairs to be borne, one half by the defendant, and one half by the lessee; that the lessee should pay to the defendant one half of the receipts of the ferry weekly during the continuance of the lease; that the lessee was to conduct all his business as such tenant, and to manage the said "farm and premises" so leased to him in a careful, prudent, and husbandlike manner, and was to allow no one but a suitable man to attend the ferry, and was to be responsible to the defendant for "damages occasioned by willful misconduct or neglect in the management of the said farm and premises, and in the management of the said ferry, and the said scow and boat"; that court held "that by this agreement H. became tenant of the defendant, both of the farm and ferry, and that the defendant was not responsible for the negligence of H. in so managing the ferry that damage had accrued to the person and property of a passenger in the boat."

In Alabama an action was brought against the licensee of a ferry. He had given the bond required by law. The suit was brought to recover the value of a wagon and horses which had been lost in crossing the ferry. It was proved, on the part of the defendant, that at the time of the loss the ferry was in the possession of a lessee, to whom it had been rented by the defendant, and who was entitled to the ferriage. By a statute of Alabama, it was declared that no person should open or establish a public ferry without license, and a bond and security as prescribed. Yet it was held that the action would not lie against the lessor of the ferry, for the reason that the tenant of the ferry was not his servant: *Ladd v. Chotard*, Minor, 366.

The supreme court of New York approve and apply the law as stated in this last case, in *Blackwell v. Wiswall*, 24 Barb. 355; and they held, also, "that, although as between the defendant and the government, the defendant might have been guilty of a breach of duty when he made the contract to lease the ferry to another, yet that such breach was not *per se* a wrongful act, for which an action would lie in favor of a stranger; that it would still be necessary to show, in order to maintain an action founded upon the mere fact that the defendant had thus leased the ferry, that by this very act he had been guilty of a wrong which had resulted in injury to the plaintiff." The same court held "that the lessor of a ferry is not liable for the torts of the lessee or his servants. The doctrine of *respondeat superior* cannot apply, as the relation between lessor and lessee is not that of partners, nor master and servant, nor agency": *Norton v. Wiswall*, 26 Barb. 618. In a recent case, an application of the law theretofore announced in that court has been made, which, unless disregarded by us, must be decisive of the question under consideration: "Where D and M had an absolute contract with a railroad company to draw its cars over a certain portion of the road, to furnish the horses and drivers for that purpose, and to assume the entire control of the work," it was held "that while D and M were in the performance of this contract, the railroad company could not be liable for the negligent acts of D and M's employees": *Schular v. Hudson River R. R. Co.*, 38 Id. 653.

We are satisfied, from the consideration of the authorities cited, that the evidence offered by the defendant in this case was material and relevant to the issue. While we are not required to determine that a corporation which has received special powers and privileges from the legislature, and assumed certain duties and liabilities to the public, may, while retaining her charter franchise, relieve herself from her liabilities by a lease of her road to other parties, we regard it as very clear, upon principle, that she cannot be held liable for the act of any servant of a receiver appointed by the court.

It may be argued that the possession of the lessee is but to the public that of the lessor. The possession of the receiver cannot, however, be regarded as the possession of the railroad company, but is in every view antagonistic thereto. "The receiver is under the control of the court that appointed him, and his possession is the possession of the court": *Angel v.*

Smith, 9 Ves. 335; *Wiswall v. Sampson*, 14 How. 52. The acts of the receiver are not the acts of the corporation, nor can she control either the receiver or his employees. An attempt to exercise such authority would be resisted by the courts. It would be a severe rule which would render the railroad company responsible for the negligence of the agent of the court that had deprived her of the possession and enjoyment of her road-bed, track, and equipments. We have been referred to no decision and are aware of no principle of law which would impose such a liability. The case of *Ohio and Mississippi R. R. Co. v. Fitch*, 20 Ind. 498, while doubtless regarded as controlling the ruling of the court below in this case, has since then been fully explained, upon all points in which the opinion therein rendered can be regarded as authority, by the later decision of this court in *McKinney v. Ohio and Mississippi R. R. Co.*, 22 Id. 99. The liability imposed in the cases cited from our reports was statutory, and did not arise from the negligent act of the servants of the corporation, and the rule *respondereat* superior could have no application.

It cannot be insisted that any special hardship results to the appellee from this ruling, for it must not be assumed that a party who suffers from the negligent act of the servants of a receiver is without remedy. The court cannot permit her possession to result in wrong to one without fault, but upon sufficient proof will grant the relief to which the sufferer may be entitled. To that forum his petition should be addressed.

As the application of the principle we have considered to the case of a corporation whose property is in the possession of a receiver involves important consequences, and the question is before the court for the first time, we have felt it proper to press the examination of authorities beyond the limits of the decisions with which counsel have favored us, and have therefore reviewed at some length the application of the rule to the various cases presented in other courts.

The evidence offered in the case now in judgment, being relevant, was clearly admissible under the general denial, as it tended to controvert a material allegation of the complaint: 2 *Gavin & Hord*, 113, sec. 91; *Schular v. Hudson River R. R. Co.*, 38 Barb. 653; *Hart v. New Orleans and Carrollton R. R. Co.*, 4 La. Ann. 261.

For the error in excluding the evidence offered by appellant, and in overruling the motion for a new trial, this cause is re-

versed at the costs of the appellee, and remanded for further proceedings in accordance with this opinion.

LIABILITY OF RECEIVER OPERATING RAILROAD: See note to *Sprague v. Smith*, 70 Am. Dec. 429, where other cases are cited. A railroad company whose road is in the hands of a receiver, and under his control and management, is not liable to an action for damages for injuries alleged to have been sustained by reason of its negligence: *Bell v. Indianapolis etc. R. R. Co.*, 53 Ind. 52; *Kate v. Smith*, 80 N. Y. 473, both citing the principal case.

CASES
IN THE
SUPREME COURT
OF
IOWA.

STATE v. SHUPE.

[16 IOWA, 82.]

MAKER OF NOTE PAYABLE IN PROPERTY MUST DELIVER PROPERTY, OR TENDER IT AT TIME AND PLACE SPECIFIED, it seems, in order to discharge himself from his obligation; but a demand of the property by the payee, after maturity, is a waiver of a previous breach by the maker, and affords him a second opportunity to deliver or tender the property.

AFFIDAVIT FOR CONTINUANCE IN IOWA, FOR ABSENCE OF WITNESS, MUST STATE his name and residence, and the facts showing the probability of procuring his testimony at the next term, the facts showing due diligence to obtain the witness or his testimony, and the facts to be proved by him.

AFFIANT IS GUILTY OF PERJURY IF HE WILLFULLY STATES IN AFFIDAVIT FOR CONTINUANCE MATTERS which are false and material to the establishment of one of the essential parts of such affidavit, although the matters stated as to the other parts are wholly immaterial.

PERJURY MAY BE COMMITTED BY SWEARING FALSELY TO COLLATERAL ISSUE BEFORE COURT. It is not essential that the fact sworn to should be material to the main issue in the case.

INDICTMENT for perjury. One Mincks brought suit against the defendant, Jonathan S. Shupe, on a note made by Shupe for \$225, payable at a specified time, "in ordinary lumber at the mill." Shupe filed an answer in the case, alleging in the second count that after the plaintiff became owner of the note, the plaintiff demanded of the defendant the lumber in payment, and the defendant then and there offered to deliver the lumber to the plaintiff, but the plaintiff refused to receive it. The alleged perjury consisted in falsely swearing to that por-

tion of an affidavit for a continuance of the cause for the absence of a witness, which stated that the witness was then temporarily absent from the state. The facts expected to be proved by the witness, as set forth in the affidavit, were the same as those averred in the second count of the answer. A continuance was granted upon the affidavit. The court instructed the jury that the allegations by Shupe in his answer did not constitute a defense to the action, and that the matters set forth in the affidavit for continuance were therefore not material to the cause of action, and could not constitute perjury, and it was the duty of the jury to return a verdict of not guilty. The jury found the defendant not guilty, and the state appealed.

C. C. Nourse, attorney-general, for the state.

By Court, COLE, J. It has been decided by this court, in the case of *Games v. Manning*, 2 G. Greene, 251, that in order for the maker of a promissory note, payable in property, to discharge himself from his obligation, it was necessary for him to pay or tender, or properly designate or set apart, the property at the time and place specified. But if the maker fails to do so, and the payee demands the property after the note becomes due, such demand is a waiver of any previous breach, and gives the maker a second opportunity to deliver or tender, or set apart the property in payment of the obligation. The same principle, so far as applicable to that case, was recognized and approved in the subsequent case of *Williams v. Triplett*, 3 Iowa, 518. In the light of these cases, it is difficult to see how the district court could justify its action, even upon the hypothesis which seems to have formed the basis of its decision.

But in the view which we take of the case, it is unnecessary to decide as to the sufficiency of the second count in the answer of the defendant of the civil cause. The assignment of perjury was not upon that portion of the affidavit which set forth the facts expected to be proven by the witness; nor is that the only material part of the affidavit for continuance. Under our practice, an affidavit for continuance has three material and essential parts. It must state the name and residence of the witness, and the facts showing the probability of procuring his testimony at the next term,—the facts constituting due diligence to obtain the witness or his testimony,—and the facts to be proved by him, etc.: Revision,

secs. 3010, 3011. All these are necessary to constitute a good and sufficient affidavit for continuance. And where a motion is made by a party to have his cause continued, each one of these essential parts becomes material to the issue arising upon such motion; and if, in his affidavit, he states, willfully false, matters which are material to the establishment of one of these parts, he is guilty of perjury, although the matters stated in relation to the other two parts are wholly immaterial.

The instructions given by the court seem to be based upon the theory that perjury can only be committed by swearing falsely to some matter directly material to the main issues in the case; but such is not the true rule of law, as we shall see by reference to a few well-recognized authorities. In the case of *King v. Grieve*, 12 Mod. 142, Lord Holt said: "I think a false oath any way conducive to the matter in issue, or a guide to the jury, though it be circumstantial, is perjury. . . . If it be a matter that tends to the discovery of truth, though but a circumstance, as, that such an one wore a blue coat, when he wore a red, it is perjury; but if he tells an impertinent story nothing to the purpose, then it is not so. If a man speak to the credit of a witness, which is not directly to the issue, yet if false, that is perjury"; or as the same learned judge is reported in 1 Ld. Raym. 258, in the same case, "that it is not necessary to appear, in an information for perjury, to what degree the point in which the man is perjured was material to the issue, for if it is but circumstantially material, it will be perjury."

So it is said in the case in 1 Hawk. P. C. 320, that "any false oath is punishable as perjury which tends to mislead the court in any of their proceedings relative to a matter judicially before them, though it in no way affects the principal judgment, which is to be given in the cause, as where a person who offers himself to be bail for another, knowingly and willfully swears that his substance is greater than it really is." Mr. Bishop, in his work on criminal law, lays down the rule to be that the testimony "need not affect the principal issue, but only a collateral one, as, for instance, if the credit of a witness is in question, and another person, to support it, swears falsely, it is perjury. Neither need it be sufficient of itself alone to produce the wrong result; if it is a part or link it is sufficient": 2 Bishop's Crim. Law, sec. 878; *Commonwealth v. Pollard*, 12 Met. 225; *Pratt v. Price*, 11 Wend. 127; *Howard v. Sexton*, 4 N. Y. 157; *State v.*

Johnson, 7 Blackf. 49; *State v. Lavalley*, 9 Mo. 324. In the last-cited case it is said: "Neither can a party escape the penalty denounced against those who swear falsely, because his evidence was not given upon the trial of the issue between the parties litigant; for all false oaths taken, and which are material upon any and every collateral issue in the progress of a cause, are equally punishable as if taken upon the trial of the main issue."

The issue before the court at the time of the taking of the oath by the defendant which is alleged to be false was the collateral issue arising upon the motion for a continuance. One material fact pertinent to that issue was the absence of the witness from the county, and the consequent inability to procure his attendance; and it is upon the sworn statement of the defendant, as to this material fact, that the perjury is assigned. It would be as inconsistent with law as it is with good morals and common sense, to permit the party to escape the penalty of his perjury, by asserting that his false oath was not material to the issues in the case, the trial of which he had thereby delayed, to the injury of his adverse litigant, and contrary to law and justice.

The ruling of the district court was therefore erroneous.

PERJURY. — By the common law, perjury was the taking of a willfully and corruptly false oath in a judicial proceeding, in regard to a matter material to the issue: See 3 Co. Inst. 164; 1 Hawk. P. C., c. 69, sec. 1; 4 Bla. Com. 137; Bac. Abr., tit. Perjury; 2 Russell on Crimes, 5th Am. ed., 596; 3 Greenl. Ev., sec. 188; Desty's Crim. Law, sec. 75. As modified by statute, it may more accurately be defined to be the willful and corrupt assertion of a falsehood, under oath or affirmation, by authority of law, in a material matter: See 2 Wharton's Crim. Law, sec. 1244; 2 Bishop's Crim. Law, sec. 1015; *Hood v. State*, 44 Ala. 86. Perjury is at common law a misdemeanor: 3 Co. Inst. 163-5; *Rex v. Johnson*, 2 Show. 1; and false swearing not strictly amounting to perjury may be indictable as an independent misdemeanor: *Regina v. Chapman*, 1 Den. C. C. 432; S. C., Temp. & M. 90; *Regina v. Hodgkiss*, L. R. 1 C. C. 212; *Ex parte Overton*, 2 Rosa, 257.

FALSITY. — The assertion must be false: 2 Bishop's Crim. Law, sec. 1043; 2 Wharton's Crim. Law, 1245; *State v. Trask*, 42 Vt. 152; and as we shall see hereafter, the falsity must be averred in the indictment; yet a witness may be guilty of perjury, although what he says is true, if he believes that he was testifying falsely: 3 Co. Inst. 166; 1 Hawk. P. C., sec. 6; 2 Bishop's Crim. Law, sec. 1043; *State v. Cruikshank*, 6 Blackf. 62.

INTENT. — It is not enough that the oath be false, in order to constitute perjury; the swearing must be willful and corrupt, and not the result of a mistake: 2 Wharton's Crim. Law, secs. 1245, 1246; 2 Bishop's Crim. Law, 1046; *Rex v. Smith*, 2 Show. 165; *Regina v. Muscot*, 10 Mod. 192; *Green v. State*, 41 Ala. 419; *Nelson v. State*, 32 Ark. 193; *Miller v. State*, 15 Fla. 577;

Thomas v. State, 71 Ga. 252; *Johnson v. People*, 94 Ill. 506; *Scott v. Cook*, 1 Duv. 314; *Cothran v. State*, 39 Miss. 541; *Brown v. State*, 57 Id. 424; *Lambert v. People*, 76 N. Y. 220; S. C., 6 Abb. N. O. 181; 32 Am. Rep. 293; *Dempsey v. People*, 20 Hun, 281; *State v. Cockran*, 1 Bail. L. 50; and it is error to instruct the jury that "the want of motive or interest to swear false is a circumstance from which they are at liberty to infer that the testimony of the defendant was not willfully and corruptly false": *Schaller v. State*, 14 Mo. 502. Nor is it sufficient to warrant a conviction to show that the prisoner had made contradictory statements under oath, without proving which was false: 1 Greenl. Ev., sec. 259; *Jackson's Case*, 1 Lew. C. C. 270; *Regina v. Wheatland*, 8 Car. & K. 238; *Regina v. Hughes*, 1 Car. & K. 519; and see post, "Evidence"; and although a witness swears one thing on one occasion and the reverse on another, it is not a necessary consequence that he has committed perjury; for he might honestly and conscientiously swear to a particular fact from the best of his recollection and belief, and from other circumstances at a subsequent time be convinced that he was wrong, and swear to the contrary, without meaning to swear falsely either time: *Jackson's Case*, *supra*. The record of acquittal of one tried for perjury, it follows from the above, is conclusive evidence in all subsequent suits that the party was not guilty of perjury, but not that his testimony in the case was true: *Bell v. Senneff*, 83 Ill. 122. Perjury, furthermore, is not committed by swearing rashly and inconsiderately, according to one's belief: *United States v. Shellmire*, Bald. 370; *United States v. Atkins*, Sprague, 558; but if one swears that a thing is so, or that he believes it to be so, when he does not believe it to be so, he is guilty of perjury, although the fact really be as stated: *State v. Cruikshank*, 6 Blackf. 62; *Patrick v. Smoke*, 3 Strob. 147; and see *supra*, "Falsity"; and he is likewise guilty if he willfully and deliberately swears to that which he believes to be true, but which he has no probable cause for so believing, and which is false: *Rex v. Pedley*, 1 Leach C. C. 325, 327; *Regina v. Schlesinger*, 10 Q. B. 670; S. C., 2 Cox C. C. 200; *Commonwealth v. Cornish*, 6 Binn. 249; *State v. Knox*, Phill. (N. O.) 312; *People v. McKinney*, 3 Park. Cr. 510; *State v. Gates*, 17 N. H. 373; *United States v. Atkins*, *supra*; compare *Commonwealth v. Brady*, 5 Gray, 78. An honest oath, taken under advice of counsel is not, upon the foregoing principles, perjury: *United States v. Stanley*, 6 McLean, 409; *United States v. Conner*, 3 Id. 573; but the advice of counsel will not protect a party who acted in bad faith, the advice being sought as a mere cover to secure immunity: *Tuttle v. People*, 36 N. Y. 431. Intoxication is no excuse: *Schaller v. State*, 14 Mo. 502; *People v. Willey*, 2 Park. Cr. 19; but while this is true, it should be submitted to the jury as a fact to be considered in connection with the other testimony in the case, in determining whether the alleged crime was committed with guilty knowledge and intent: *Lytle v. State*, 31 Ohio St. 196.

OATH. — 1. *In General*. — While the oath must be solemnly administered, its form is immaterial: 2 Wharton's Crim. Law, sec. 1251; 2 Bishop's Crim. Law, sec. 1018; *State v. Keene*, 26 Me. 33. "To make a valid oath, for the falsity of which perjury will lie," says the court of appeals of New York, "there must be in some form, in the presence of an officer authorized to administer it, an unequivocal and present act, by which the affiant consciously takes upon himself the obligation of an oath": *O'Reilly v. People*, 86 N. Y. 154; S. C., 10 Abb. N. C. 53; 40 Am. Rep. 525. Kissing the Book is not essential: *Rex v. Ealy*, 1 Cr. & D. 199; *Mudrone's Case*, 1 Leach C. C. 412. If a form be prescribed, a substantial compliance is all that is necessary: *State v. Dayton*, 23 N. J. L. 49; S. C., 53 Am. Dec. 270; *Sharp v. Wilhite*, 2 Humph. 434; *State v. Gates*, 17 N. H. 373;

Commonwealth v. Smith, 11 Allen, 243; *State v. Green*, 24 Ark. 591; *State v. Owen*, 72 N. C. 605; and where a statute provides for swearing on the Gospels, and declares that when any person has conscientious scruples about taking the oath in that manner, he may be sworn with the uplifted hand, should a witness be sworn with the uplifted hand without objection, although not conscientiously scrupulous about swearing on the Gospels, he will subject himself to a charge of perjury if his oath be willfully false: *State v. Whisenand*, 2 Hawks, 458.

2. *Before Competent Officer or Tribunal.*—The oath, if non-judicial, must have been taken before an officer having competent authority to administer it; or if it be judicial, before a court having jurisdiction of the proceedings: 2 Wharton's Crim. Law, sec. 1257; 2 Bishop's Crim. Law, sec. 1020; *Paine's Case*, Yel. 111; *Rex v. Verelst*, 8 Camp. 433; *Rex v. Hawks*, 3 Car. & P. 419; *Regina v. Newton*, 1 Car. & K. 469; *Regina v. Stone*, Dears. O. C. 251; *Regina v. —*, 1 Cox C. C. 50; *Regina v. Pearce*, 9 Id. 258; S. C., 3 Best & S. 531; *Regina v. Hughes*, 7 Cox C. C. 286; S. C., Dears. & B. 188; *Regina v. Senior*, 9 Cox C. C. 469; S. C., Leigh & C. 409; *Regina v. Shaw*, 10 Cox C. C. 66; *Regina v. Townsend*, 10 Id. 356; *Regina v. Bacon*, 11 Id. 540; *Regina v. Lewis*, 12 Id. 163; *Regina v. Willis*, 12 Id. 164; *Ponkey v. People*, 2 Ill. 80; *Van Dusen v. People*, 78 Id. 645; *Muir v. State*, 8 Blackf. 154; *Weston v. Lemley*, 33 Ind. 486; *State v. Phippen*, 62 Iowa, 54; *Biggerstaff v. Commonwealth*, 11 Bush, 169; S. C., 1 Am. Cr. Rep. 497; *State v. Hall*, 49 Mo. 412; *Commonwealth v. White*, 8 Pick. 453; *White v. State*, 1 Smedes & M. 149; *State v. Cannon*, 79 Mo. 343; *Ortner v. People*, 6 Thomp. & C. 548; *Boling v. Luther*, Term Rep. (N. C.) 202; *State v. Alexander*, 4 Hawks, 182; *Warwick v. State*, 25 Ohio St. 21; *State v. Jackson*, 36 Id. 281; *Staigt v. State*, 39 Id. 496; *State v. Hayward*, 1 Nott & McC. 540; *State v. McCroskey*, 3 McCord, 308; *State v. Powell*, 28 Tex. 626; *United States v. Nickerson*, Sprague, 232; *United States v. Sonachall*, 4 Biss. 425; *United States v. Curtis*, 107 U. S. 671; *United States v. Neale*, 14 Fed. Rep. 767; but see the remarks of Kelly, C. B., in *Regina v. Proud*, L. R. 1 O. C. 71, 74; S. C., 10 Cox C. C. 455. If, therefore, a non-judicial oath appears to have been taken before a person who had no lawful authority to administer it, or a judicial oath before a court which had no jurisdiction of the cause, the defendant must be acquitted. But if the court had jurisdiction, it is not necessary that the proceedings should have been strictly regular: *State v. Lavallee*, 9 Mo. 834; and where it is shown that the oath was administered to the defendant in open court, a presumption arises that it was regularly done: *State v. Mace*, 86 N. C. 668. The administration of the oath may be done by any one in the presence and by the direction of the court: *State v. Knight*, 84 Id. 780. It is sufficient, *prima facie*, to show that the person by whom the oath was administered was an acting magistrate: *State v. Hascall*, 6 N. H. 352; *Regina v. Roberts*, 38 L. T., N. S., 690; or to show that the oath was administered in open court by one who was acting as deputy clerk: *Keator v. People*, 32 Mich. 484; *Staigt v. State*, 39 Ohio St. 496, 498; and an oath administered during a trial, by one who was acting as an assistant of the clerk, at the clerk's request, is presumed to have been done with the assent of the court, and therefore properly administered: *Stephens v. State*, 1 Swan, 157; and see *Warwick v. State*, 25 Ohio St. 21.

3. *In Proceeding Authorized by Law.*—The false swearing must, furthermore, at the common law, have been in a judicial proceeding: 2 Wharton's Crim. Law, sec. 1267; *Rex v. Aylett*, 1 T. R. 63, 69; *Regina v. Hurrell*, 3 Forst. & F. 271; *State v. Dayton*, 23 N. J. L. 49; S. C., 53 Am. Dec. 270; *Anonymous*, 1 Wash. C. C. 84; but under modern statutes it is sufficient if the oath be

administered in the course of justice: 2 Bishop's Crim. Law, sec. 1026; 2 Wharton's Crim. Law, sec. 1267. A mere voluntary or extrajudicial oath cannot, therefore, amount to perjury: *Rea v. Cohen*, 1 Stark. 511; *Regina v. Bishop*, Car. & M. 302; *Regina v. Ewington*, Id. 319; S. C., 2 Moody C. C. 223; *Warner v. Fowler*, 8 Md. 25; *Beecher v. Anderson*, 45 Mich. 543; *Mahan v. Berry*, 5 Mo. 21; *State v. Union Quarter Sessions*, 45 N. J. L. 523; *State v. Wyatt*, 2 Hayw. 56; *Pegram v. Styron*, 1 Bail. 595; *Silver v. State*, 17 Ohio, 365; *Waggoner v. Richmond*, Wright, 173; *Linu v. Commonwealth*, 96 Pa. St. 285; *State v. Helle*, 2 Hill (S. C.), 290; *Landen v. State*, 5 Humph. 83; *United States v. Nickerson*, Sprague, 232; *United States v. Babcock*, 4 McLean, 113. Thus, for example, perjury cannot be assigned in falsely swearing to an affidavit not authorized by law: See *Waggoner v. Richmond*, and other cases cited, *supra*; nor can it be assigned of a false oath to a protest taken before a notary public, as part of the preliminary proofs, in case of a marine loss: *People v. Travis*, 4 Park. Cr. 213.

Perjury therefore may be assigned on an answer in chancery: *Regina v. Yates*, Car. & M. 132; although, it has been held, not unless the bill calls for an answer under oath: *Silver v. State*, 17 Ohio, 365. The taking of a false oath before a court martial is perjury: *Regina v. Heame*, 4 Best & S. 947; S. C., 9 Cox C. C. 433; *State v. Gregory*, 2 Murph. 69; or before an ecclesiastical council: *Chapman v. Gillet*, 2 Conn. 40; *sed quere*; or in a legislative inquiry: *Ex parte McCarthy*, 29 Cal. 395; or in proceedings before referees or arbitrators, under a rule of court: *State v. Keme*, 26 Me. 33; *State v. Stephenson*, 4 McCord, 165; *Regina v. Ball*, 6 Cox C. C. 360; or at a hearing before a board of fence viewers: *Jones v. Daniels*, 15 Gray, 438; or upon an investigation into a charge of drunkenness against the master of a ship before a local marine board, constituted by statute: *Regina v. Tomlinson*, L. R. 1 Q. C. 49; S. C., 10 Cox C. C. 332; or in naturalization proceedings: *United States v. Jones*, 14 Blatchf. 90; or in *habeas corpus* proceedings: *White v. State*, 1 Smedes & M. 149; or before a grand jury: *State v. Fasset*, 16 Conn. 457; *State v. Offutt*, 4 Blackf. 355; *State v. McCormick*, 52 Ind. 169; *State v. Schill*, 27 Iowa, 263; *State v. Terry*, 30 Mo. 363; *Regina v. Hughes*, 1 Car. & K. 519; compare *Pamkey v. People*, 2 Ill. 80; or to procure a marriage license: *Call v. State*, 20 Ohio St. 330; *Warwick v. State*, 25 Id. 21; *contra*: *Rea v. Foster*, Russ. & R. C. C. 459; but see *Rea v. Alexander*, 1 Leach C. C. 63; *Regina v. Chapman*, 3 Cox C. C. 467; S. C., 2 Car. & K. 846; 1 Den. C. C. 432; Temp. & M. 90; *Regina v. Barnes*, 10 Cox C. C. 539; or in swearing to facts required to be stated in affidavits by drafted men, claiming exemption from military service: *United States v. Sonackall*, 4 Biss. 425; or upon an affidavit charging an offense, and made for the purpose of procuring a warrant therefor: *Pennaman v. State*, 58 Ga. 336; or for the purpose of obtaining a search warrant, for the discovery of property alleged to have been stolen, although no particular person is charged with having committed the offense: *Carpenter v. State*, 1 How. (Miss.) 163; S. C., 34 Am. Dec. 116; or in taking the poor debtor's oath: *Arden v. State*, 11 Conn. 408; or in the oath by an insolvent debtor: *Commonwealth v. Calvert*, 1 Va. Cas. 181; compare *Anonymous*, 1 Wash. C. C. 84; or on a motion for a continuance: See the principal case; *State v. Jackson*, 7 Blackf. 49; or on a motion for a new trial: *State v. Chandler*, 42 Vt. 446; or for the purpose of obtaining a *certiorari*: *Pratt v. Price*, 11 Wend. 127; or in a justification as bail: *Commonwealth v. Butland*, 119 Mass. 317; *Commonwealth v. Hatfield*, 107 Id. 227; or in a justification of sureties on a match-stamp bond, authorizing the delivery on credit of stamp to a manufacturer of matches: *Ralph v. United States*, 11 Biss. 88; or in a justification of sureties

an appeal bond: *Territory v. Weller*, 2 N. M. 470; or by a juror on his own dire: *State v. Wall*, 9 Yerg. 347; *State v. Moffatt*, 7 Humph. 250; *Hilliard v. State*, 14 Lea, 648; *State v. Howard*, 63 Ind. 502; *Commonwealth v. Stockley*, 10 Leigh, 678. But perjury cannot be assigned on an affidavit for the issuance of an attachment where the affidavit is not in the form required by law, and upon which no attachment could issue: *Hood v. State*, 44 Ala. 81; nor upon an affidavit to procure a continuance, if the affidavit does not show grounds for a continuance: *State v. Hobbs*, 40 N. H. 229.

4. *Perjury under Laws of Congress.* — A state court cannot punish for perjury when made such under an act of Congress: 2 Wharton's Crim. Law, sec. 1275; *Ex parte Bridges*, 2 Woods, 428; *United States v. Cornell*, 2 Mason, 60; *State v. Pike*, 15 N. H. 83; *State v. Kirkpatrick*, 32 Ark. 117; *People v. Kelly*, 38 Cal. 145; *State v. Adams*, 4 Blackf. 146; *State v. Shelley*, 11 Lee, 594; although it would seem to be otherwise, on principle, if the offense strikes at the integrity of the state: 2 Wharton's Crim. Law, sec. 1275; and therefore false swearing in a naturalization proceeding, while it may also be an offense against the federal government, may be punished by a state: *State v. Whittemore*, 50 N. H. 245; S. C., 9 Am. Rep. 196; *Rump v. Commonwealth*, 30 Pa. St. 475; *contra: People v. Sweetman*, 3 Park. Cr. 358.

MATERIALITY. — 1. *False Swearing Required to be in Material Matter.* — The matter sworn to, in order that perjury may be assigned upon it, must be material to the issue or question in controversy: 2 Wharton's Crim. Law, sec. 1276; 2 Bishop's Crim. Law, sec. 1030; *Re v. Aylett*, 1 Term Rep. 63, 69; *Re v. Pepys, Peake*, 138; *Regina v. Murray*, 1 Fost. & F. 80; *Regina v. Muscot*, 10 Mod. 192; *Regina v. Worley*, 3 Cox C. C. 535; *Regina v. Owen*, 6 Id. 105; *Regina v. Ball*, 6 Id. 360; *Regina v. Naylor*, 11 Id. 13; *Regina v. Aloop*, 11 Id. 264; *Regina v. Tate*, 12 Id. 7; *Regina v. Lewis*, 1 Id. 163; *Gibson v. State*, 44 Ala. 17; *People v. McDermott*, 8 Cal. 288; *People v. Peramo*, 64 Id. 106; *Miller v. State*, 15 Fla. 577; *Commonwealth v. Parker*, 2 Oush. 212; *Beecher v. Anderson*, 45 Mich. 543; *Nelson v. State*, 47 Miss. 621; *Martin v. Miller*, 4 Mo. 47; S. C., 28 Am. Dec. 342; *Wood v. People*, 59 N. Y. 117; *State v. Withers*, 3 Murph. 153; *Smith v. Deaver*, 6 Jones & L. 563; *Crump v. Commonwealth*, 75 Va. 922; *Rhodes v. Commonwealth*, 78 Id. 692; *State v. Meader*, 54 Vt. 128; *Plath v. Bransdorff*, 40 Wis. 107; *Commonwealth v. Farley*, Thach. C. C. 654; *United States v. Shinn*, 8 Saw. 403; S. C., 14 Fed. Rep. 447. "Testimony tending to affect the verdict of the jury, or extenuating or increasing the damage, and thus influencing the judgment of the court, is material": *State v. Norris*, 9 N. H. 96. A witness who swears falsely is guilty of perjury, although the jury do not give credit to his oath: *Hamper's Case*, 3 Leon. 230. "It does not lie with the perjurer to say that if he had sworn to the truth, the case, for other reasons, would have failed": *Wood v. People*, 59 N. Y. 117; *People v. Grimshaw*, 33 Hun, 505, 509. "It is the act of false swearing in respect to a matter material to the point of inquiry which constitutes the crime, and not the injury which it may have done to individuals, or the degree of credit which was given to the testimony": *Pollard v. People*, 69 Ill. 148, 154. The circumstance that the evidence was withdrawn does not affect the question of perjury: *Regina v. Phillpotts*, 5 Cox C. C. 363; S. C., 3 Car. & K. 135; 2 Den. C. C. 302; and a person may be guilty in swearing to an affidavit, although no use is afterwards made of it: *Re v. Crossley*, 7 Term Rep. 315; *Re v. White*, Moody & M. 271; *State v. Whittemore*, 50 N. H. 245; S. C., 9 Am. Rep. 196; *contra: Morrell v. People*, 32 Ill. 499. "Can it make any difference," says Lord Tenterden, in *Re v. White*, *supra*, "that it afterwards turns out that the motion is not made? The

crime, if any, is the same, morally, in each case." And it has been held that a party may be indicted for perjury in an affidavit which cannot, from certain informalties, be received in the court: *Rez v. Hailey*, Ryan & M. 94; *Regina v. Christian*, Car. & M. 388; and although evidence is inadmissible in point of law, yet having been admitted, and being relevant to the credit of a material witness in the cause, perjury may be assigned upon it: *Regina v. Gibbons*, 9 Cox C. C. 106; S. C., Leigh & C. 109; so a witness may be convicted of perjury in falsely swearing to a promise within the statute of frauds, although parol evidence of the promise would not be competent if objected to: *Howard v. Sexton*, 4 N. Y. 157; but certain old English cases hold the contrary: *Rez v. Dunston*, Ryan & M. 109; *Rez v. Benesech*, Peake Add. Cas. 93; and see 2 Bishop's Crim. Law, sec. 1038; and a witness may likewise be punished, although he was erroneously sworn, or was an incompetent witness: See post, "Party to be Charged." Evidence of the defendant, given on the trial of another for perjury, may have been material, although the indictment was held bad on a writ of error: *Regina v. Meek*, 9 Car. & P. 513. Perjury cannot be predicated upon an opinion of law: *State v. Henderson*, 90 Ind. 406; nor can a charge of perjury be sustained where the supposed perjury depends upon the construction of a deed: *Rez v. Crepigny*, 1 Rep. 280; *State v. Woolston*, 8 Blackf. 452; and see *Anonymous*, 1 Wash. C. C. 84. If perjury is committed by a witness in denying any matter, it is none the less perjury because on cross-examination or further examination he confessed the truth of the matter he had before denied: *Martin v. Miller*, 4 Mo. 47; S. C., 28 Am. Dec. 342.

2. *False Swearing in Collateral Matter.*—But while it is necessary that the false swearing be material, it need not be material to the main issue or question, but to a collateral matter: 2 Bishop's Crim. Law, sec. 1032; 2 Wharton's Crim. Law, sec. 1277; *Rez v. Greep*, Holt, 535; S. C., *sub nom.* *Rez v. Griep*, 1 Id. Raym. 256; 12 Mod. 139; *Regina v. Atlas*, 1 Cox C. C. 17; *Jacobs v. State*, 61 Ala. 448; S. C., 4 Am. Crim. Rep. 465; *Williams v. State*, 66 Id. 551; *Robinson v. State*, 18 Fla. 898; *Stevens v. State*, 18 Id. 902; *Commonwealth v. Pollard*, 12 Met. 225; *Commonwealth v. Grant*, 116 Mass. 17; S. C., 1 Am. Crim. Rep. 500; *State v. Lavalley*, 9 Mo. 534; *State v. Mooney*, 65 Id. 494; *State v. Wakefield*, 73 Id. 549; *Wood v. People*, 59 N. Y. 117; *Stoddard v. Linville*, 3 Hawks, 474; *State v. Brown*, 79 N. C. 642, 644; *Dilcher v. State*, 39 Ohio St. 130; *State v. Hattaway*, 2 Nott & McC. 118; S. C., 10 Am. Dec. 590; *Bradberry v. State*, 7 Tex. App. 375. "It is perjury," says Chief Justice Holt, in *Rez v. Greep*, *supra*, "to swear falsely in any circumstance which condueth to the issue, or to the discovery of the truth, though if it be only in some impertinent or minute circumstance;" and again, it is said by the supreme court of Massachusetts, in *Commonwealth v. Grant*, *supra*: "A party not only commits perjury by swearing falsely and corruptly as to the fact which is immediately in issue, but also by so doing as to material circumstances which have a legitimate tendency to prove or disprove such fact." Thus, perjury may be assigned upon false testimony offered to procure the admission of a document in evidence, material to the question: *Regina v. Phillpotts*, 5 Cox C. C. 363; S. C., 3 Car. & K. 135; 2 Den. C. C. 302; or for the purpose of augmenting or mitigating the damages: *Lawrence v. State*, 2 Tex. App. 479; *State v. Keenan*, 8 Rich. 456; *Stephens v. State*, 1 Swan, 157. So, the testimony of a person offering himself as bail, as to the value of his property, is material: *Commonwealth v. Butland*, 119 Mass. 317; and perjury may be committed by a surety on an appeal bond swearing falsely in regard to his property: *Territory v. Weller*, 2 Nott & McC. 470. It is also well settled

that testimony affecting the credibility of a witness is material: *Rez v. Griepke*, 1 Ld. Raym. 256; S. C., 12 Mod. 139; *Regina v. Overton*, Car. & M. 656; S. C., 2 Moody C. C. 263; *Regina v. Lavey*, 3 Car. & K. 26; *Regina v. Gibbons*, 9 Cox C. C. 106; S. C., Leigh & C. 109; *Regina v. Tyson*, L. R. 1 C. C. 107; S. C., 11 Cox C. C. 1; *Williams v. State*, 68 Ala. 551; *People v. Barry*, 63 Cal. 62; *Salmons v. Tait*, 31 Ga. 676; *People v. Courtney*, 94 N. Y. 490; *United States v. Landenberg*, 21 Blatchf. 169; S. C., 23 Fed. Rep. 586; 4 Am. Crim. Rep. 474. Every question on the cross-examination of a witness, then, which goes to his credit, is material: *Id.*

3. *Materiality must be Established.* — The materiality of the testimony must be established by evidence, and cannot be left to presumption or inference: *State v. Aikens*, 32 Iowa, 403; *Nelson v. State*, 32 Ark. 193; and proof that the testimony was admitted on the trial is not sufficient to warrant a jury in inferring that such testimony was material to the issue: *Commonwealth v. Polard*, 12 Met. 225.

4. *Materiality, Question for Court.* — Although some opinions have been expressed to the effect that the materiality of the alleged false testimony is for the jury: *Regina v. Lavey*, 3 Car. & K. 26; *Regina v. Goddard*, 2 Fost. & F. 361; *Regina v. Worley*, 3 Cox C. C. 535; the weight of authority is, that when there is no dispute about the facts sworn to, the question is one of law for the courts: *Regina v. Southwood*, 1 Fost. & F. 356; *Regina v. Courtney*, 7 Cox C. C. 111; *Regina v. Mullany*, 10 Id. 97; S. C., Leigh & C. 593; *Nelson v. State*, 32 Ark. 193; *Cothran v. State*, 39 Miss. 541; *Steinman v. McWilliams*, 6 Pa. St. 170, 177; *State v. Lewis*, 10 Kan. 157; *Donohoe v. State*, 14 Tex. App. 638; *Jackson v. State*, 15 Id. 579.

PARTY TO BE CHARGED. — The crime being distinct, several persons cannot be joined. Even supposing two persons to swear jointly to the same false affidavit, it is impossible to suppose that they did so at the same moment of time, so as to make the offense exactly joint: 2 Wharton's Crim. Law, sec. 1253; *Rez v. Phillips*, 2 Strange, 921.

If a person is erroneously sworn, or is incompetent as a witness, but is permitted to testify, he may nevertheless be prosecuted for perjury for falsely swearing: 2 Wharton's Crim. Law, sec. 1254; *Chamberlain v. People*, 23 N. Y. 85; S. O., 80 Am. Dec. 255; *Van Steenburgh v. Korte*, 10 Johns. 167; *People v. Bowe*, 34 Hun, 528; *Montgomery v. State*, 10 Ohio, 220; *State v. Molier*, 1 Dev. 263; *Sharp v. Wilhite*, 2 Humph. 434; *Haley v. McPherson*, 3 Id. 104; and where the defendant in a civil action is called by the plaintiff to testify to a matter to which he is the only competent witness, it may be shown in a criminal prosecution for perjury that he swore falsely: *State v. Voght*, 37 Iowa, 117.

It is not requisite that the witness should have been served with a subpoena: *Commonwealth v. Knight*, 12 Mass. 273; S. O., 7 Am. Dec. 72, 73.

INDICTMENT. — 1. *Falsity.* — The indictment must aver that the defendant swore falsely: 2 Bishop's Crim. Proc., sec. 918; 2 Wharton's Crim. Law, sec. 1286; *Rez v. Harris*, 1 Dow. & R. 578; S. O., 5 Barn. & Ald. 926; *United States v. Babcock*, 4 McLean, 113; *Commonwealth v. Sargent*, 129 Mass. 115; *Perdue v. Commonwealth*, 96 Pa. St. 311; and the falsity of the statement must appear by averment, and not be left to be adduced by argument and intentment: *Juarqui v. State*, 28 Tex. 625; *Gibson v. State*, 44 Ala. 17; *Burns v. People*, 59 Barb. 531. Where the defendant made affidavit that he believed the prosecutors had committed the crime of larceny, an averment that no such crime was committed by them does not show that the defendant swore falsely: *State v. Lea*, 3 Ala. 602. The indictment must therefore

allege that the defendant "falsely" swore; to allege that he "feloniously, corruptly, knowingly, willfully, and maliciously," swore is not enough; *Regina v. Ozley*, 3 Car. & K. 317; but an indictment which states that the defendant did "voluntarily, and of his own free will and accord, propose to the said court to purge himself upon oath of the said contempt alleged against him," negating by express averments the truth of the oath, and concluding that the defendant "did knowingly, falsely, wickedly, maliciously, and corruptly commit willful and corrupt perjury," is good: *Respublica v. Newell*, 3 Yeates, 407; S. C., 2 Am. Dec. 381; see further post, "Negating False Matter."

2. *Intent*. — The indictment must, furthermore, charge that the defendant "willfully and corruptly" swore falsely: 2 Wharton's Crim. Law, sec. 1286; 2 Bishop's Crim. Proc., sec. 922; *Rez v. Stevens*, 5 Barn. & C. 246; S. C., *sub nom. Rez v. Richards*, 7 Dowl. & R. 665; *State v. Carland*, 1 Dev. L. 114; *State v. Davis*, 84 N. C. 787; *Thomas v. Commonwealth*, 2 Rob. (Va.) 795; *Commonwealth v. Corel*, 105 Mass. 582; compare *Rez v. Cox*, 1 Leach C. C. 71, since the mere fact that the oath is false is not perjury.

The word "willfully" does not mean in the common acceptance of the term "corruptly"; *Steinman v. McWilliams*, 6 Pa. St. 170, 178. An averment that the defendant "deposed and gave in evidence to the jury, willfully and corruptly," amounts to a charge that he "swore" willfully and corruptly: *State v. Bobbitt*, 70 N. C. 81. But in Maryland it is not necessary to aver that he swore "corruptly": *State v. Bitler*, 62 Md. 354. An allegation that the defendant "falsely, corruptly, and willfully" swore is sufficient, without the word "knowingly": *State v. Sleeper*, 37 Vt. 122; *Johnson v. People*, 94 Ill. 505; compare *United States v. Babcock*, 4 McLean, 113. Under the Texas penal code, it is indispensable that the charge should be made in the statutory words "deliberately and willfully": *Allen v. State*, 42 Tex. 12; *State v. Perry*, 42 Id. 238; *State v. Webb*, 41 Id. 67; *Smith v. State*, 1 Tex. App. 620; and see *State v. Powell*, 28 Tex. 626. Where the offense is made a felony, it has been held necessary that it should be charged to have been committed "feloniously": *State v. Terry*, 30 Mo. 368; *State v. Williams*, 30 Id. 364; *Nelson v. State*, 32 Ark. 193; but in California an indictment charging that the defendant "did willfully, corruptly, and falsely swear," but not alleging that the perjury was committed "feloniously," was held sufficient: *People v. Parsons*, 6 Cal. 487. An averment that the accused "knew" that the statement was false is necessary only when the oath was as to his belief: *Brown v. State*, 57 Miss. 424; *State v. Raymond*, 20 Iowa, 582; compare *Commonwealth v. Cook*, 1 Rob. (Va.) 729.

3. *Oath*. — a. *In General*. — If the false swearing was before a judicial tribunal, the indictment must aver that the defendant was sworn as a witness: *Rez v. Stevens*, 5 Barn. & C. 246; but it is not necessary that it should appear whether or not he was subpoenaed: *Commonwealth v. Knight*, 12 Mass. 273; S. C., 7 Am. Dec. 72. It is not necessary to allege in what particular mode or form the defendant was sworn. It is enough to aver that he was "duly sworn": 2 Wharton's Crim. Law, sec. 1287; 2 Bishop's Crim. Proc., sec. 912; *Rez v. McCarther*, Peake, 211; *Dodge v. State*, 24 N. J. L. 455; *Tuttle v. People*, 36 N. Y. 431; *Burns v. People*, 59 Barb. 531; *State v. Farrow*, 10 Rich. 165; *Commonwealth v. Warden*, 11 Met. 406; *Respublica v. Newell*, 13 Yeates, 407; S. C., 2 Am. Dec. 381; compare *State v. Umdenstock*, 43 Tex. 554. Proof that the defendant was "sworn and examined as a witness," supports an averment that he "was duly sworn, and took his corporal oath on the holy Gospel," that being the ordinary mode of swearing: *Rez v. Rowley*, Ry. & M. 299,

302; and evidence that a witness was sworn to tell "the whole truth, and nothing but the truth," is sufficient to sustain an allegation that he was sworn to tell "the truth, the whole truth, and nothing but the truth": *State v. Gates*, 17 N. H. 373. An averment that the accused was sworn "by and before" a board of election inspectors, is a sufficient averment that the oath was administered by the board; and, it seems, it would have been sufficient to allege that he took the oath "before" the board, they being duly authorized to administer it: *Campbell v. People*, 8 Wend. 636. The terms "corporal" oath and "solemn" oath are used synonymously, and an oath taken with the uplifted hand may be properly described by either term: *Jackson v. State*, 1 Ind. 184; *State v. Norris*, 9 N. H. 96; *Burns v. People*, 59 Barb. 531, 543. "The term 'corporal oath' must be considered as applying to any bodily assent to the oath of the witness": *State v. Norris*, *supra*. Still, it has been held that if the indictment sets out the oath, or the method of taking it, with needless particularity, the proof must correspond with the allegation: *State v. Porter*, 2 Hill (S. O.), 611; *State v. Davis*, 69 N. C. 383; *Stewart v. State*, 6 Tex. App. 184; but see *Patrick v. Smoke*, 3 Strob. L. 147. An indictment founded upon an oath differing both in form and substance from that which the officer is authorized by statute to administer, is bad: *State v. Perry*, 42 Tex. 238; and see *State v. Blackstone*, 74 Ind. 592.

The name of the person or court administering the oath must be averred, and a variance in this respect is fatal: 2 Wharton's Crim. Law, sec. 1287; *Kerr v. People*, 42 Ill. 307; *State v. Ellison*, 8 Blackf. 225; *Hiteaman v. State*, 48 Ind. 473; *State v. Schultz*, 57 Id. 19; *State v. Harris*, 33 La. Ann. 1172; *Guston v. People*, 61 Barb. 35; S. C., 4 Lans. 487; *State v. Street*, 1 Murph. 156; S. C., 3 Am. Dec. 682; *State v. Oppenheimer*, 41 Tex. 82; *United States v. Wilcox*, 4 Blatchf. 391; and where the perjury is alleged to have been committed by a witness in the trial of an action in a certain court, it is sufficient to allege that the oath was taken in that court, without designating the officer by whom it was administered: *State v. Spencer*, 6 Or. 152.

b. *Before Competent Officer or Tribunal.* — It must appear from the indictment that the oath was administered by a person authorized to administer it, and if before a court or other tribunal, that such judicial tribunal had jurisdiction over the matter: 2 Wharton's Crim. Law, secs. 1288 et seq.; 2 Bishop's Crim. Proc., secs. 910 a, 914; *Morrell v. People*, 32 Ill. 499; *Kerr v. People*, 42 Id. 307; *McGrager v. State*, 1 Ind. 232; *State v. Nickerson*, 46 Iowa, 447; *State v. Furlong*, 26 Me. 69; *State v. Plummer*, 50 Id. 217; *State v. Hamilton*, 65 Mo. 667; *State v. Owen*, 73 Id. 440; *State v. Ammons*, 3 Murph. 123; *State v. Knight*, 84 N. C. 789; *Steinston v. State*, 6 Yerg. 531; *State v. Wise*, 3 Lea, 38; *State v. Webb*, 41 Tex. 67; *Conner v. Commonwealth*, 2 Va. Cas. 30; *Commonwealth v. Pickering*, 8 Gratt. 628; S. C., 56 Am. Dec. 158; but this does not seem to be required in Massachusetts: *Commonwealth v. Knight*, 12 Mass. 273; S. C., 7 Am. Dec. 72; *Commonwealth v. Hughes*, 5 Allen, 499; *Commonwealth v. Hatfield*, 107 Mass. 227, 230; and see *State v. Newton*, 1 G. Greene, 160; S. C., 48 Am. Dec. 367. It is not necessary, however, either under the statute 23 Geo. II., c. 11, relating to perjury, or under the American statutes and law to show how the officer acquired authority, and the nature of it, or the manner in which the court obtained jurisdiction: *Rex v. Callanan*, 6 Barn. & C. 102; S. C., 9 Dowl. & R. 97; *State v. Belew*, 79 Mo. 584; *State v. Ludlow*, 5 N. J. L. 772; *State v. Dutton*, 23 Id. 49; S. C., 53 Am. Dec. 270; *People v. Phelps*, 5 Wend. 9; *People v. Warner*, 5 Id. 271; *Elghny v. People*, 79 N. Y. 546, 556; *People v. Tredway*, 3 Barb. 470; *Burns v. People*, 59 Id. 531; *State v. Peters*, 42 Tex. 7; *Stewart v. State*, 6 Tex. App.

184; *Bradberry v. State*, 7 Id. 375; *Powers v. State*, 17 Id. 428; *Anderson v. State*, 18 Id. 17; *Stafer v. State*, 3 W. Va. 689. A general allegation of authority or jurisdiction is therefore sufficient: Id.

c. *In Proceeding Authorized by Law*. — It is also necessary that an indictment for perjury, either at the common law or under the statute 23 Geo. II., c. 11, should show on its face that the oath was taken in a judicial proceeding; or, to state the proposition in conformity with modern statutes, that the oath was one authorized by law: *Regina v. Gardiner*, 2 Moody C. C. 95; *Regina v. Overton*, 4 Q. B. 83; S. C., 3 Gale & D. 133; *Morrell v. People*, 32 Ill. 499; *People v. Fox*, 25 Mich. 492; *People v. Gaige*, 26 Id. 30; *State v. Hamilton*, 7 Mo. 300; *State v. Crumb*, 68 Id. 206; *State v. Lamont*, 2 Wis. 437. It is not enough to aver that the perjury was committed in a proceeding in a court of justice: *State v. Hanson*, 39 Me. 337; so it is not sufficient to charge the defendant with having committed perjury "by falsely swearing to material matter in a writing signed by him": *State v. Mace*, 76 Id. 64; S. C., 5 Am. Cr. Rep. 583.

4. *Setting out False Matter*. — An indictment for perjury must state a day certain on which the offense was committed: *State v. Offutt*, 4 Blackf. 355; *United States v. Bowman*, 2 Wash. C. C. 323; *State v. Hanson*, 39 Me. 337; and it is not a sufficiently precise allegation that the prisoner swore that a certain event did not happen within two fixed dates, his attention not having been called to the particular day upon which the transaction was alleged to have taken place: *Regina v. Stoddy*, 1 Fost. & F. 518.

The substance of the oath seems to be all that the indictment is required to state: 2 Wharton's Crim. Law, sec. 1297; 2 Bishop's Crim. Proc., sec. 915; *Taylor v. State*, 49 Ala. 157; *State v. Green*, 24 Ark. 591; *United States v. Morgan*, Morris, 341; S. C., 41 Am. Dec. 234; *People v. Phelps*, 5 Wend. 9; *People v. Warner*, 5 Id. 271; *Tuttle v. People*, 36 N. Y. 431; *State v. Groves*, Bush. 402; *State v. Witham*, 6 Or. 366; *State v. Stillman*, 7 Coldw. 341; *Larson v. State*, 3 Lea, 309; *Woods v. State*, 14 Id. 460; *Bradberry v. State*, 7 Tex. App. 375; *West v. State*, 8 Id. 119; *Brown v. State*, 9 Id. 171; *Gabriele v. State*, 13 Id. 428; *Jackson v. State*, 15 Id. 579; *State v. Umdenstock*, 43 Tex. 554; *United States v. Walsh*, 22 Fed. Rep. 644. Where, however, the tenor of an affidavit is undertaken to be recited, the recital must be exact: *Rees v. Leafe*, 2 Camp. 134; and it was held in *Coppack v. State*, 36 Ind. 513, that the tenor of an affidavit, and not its substance, should be set out. It is not necessary to set out the whole oath, but only those parts alleged to be false: *Campbell v. People*, 8 Wend. 636; *State v. Neal*, 42 Mo. 119; *State v. Wakefield*, 73 Id. 549. It has been held that an indictment for perjury alleged to have been committed on an examination of a person charged with a crime should show what the crime was: *United States v. Wilcox*, 4 Blackf. 391; and that an indictment which charges the false statement to have been made on the trial of a party charged with a criminal offense is bad, if it fails to state that an indictment had been found against such party: *State v. Webb*, 41 Tex. 67; *State v. Gillman*, 2 Ired. 372, 373; and see *Stein-ton v. State*, 6 Yerg. 531.

It is necessary, however, that the indictment should be clear and explicit, so as to fully inform the accused of the charge against him: *State v. Green*, 24 Ark. 591; *State v. Schill*, 27 Iowa, 263; *Kerr v. People*, 42 Ill. 307; *State v. Bialer*, 62 Md. 354; *Rees v. Aylett*, 1 Term Rep. 63, 69; *Regina v. Thomas*, 2 Car. & K. 806. The facts constituting the offense should not be averred by way of inference or argument: *State v. Powell*, 23 Tex. 626; and the charges should not be in the alternative or disjunctive: *Dodge v. State*, 24

N. J. L. 455; but the question to which the alleged perjury is the answer may be in the alternative; and if so, it should be so alleged: *Id.* Where an indictment charged the defendant with having committed perjury by swearing at a court in July that he witnessed a transaction in October of the same year, it was held not to be a repugnancy, nor to afford cause for arresting the judgment: *State v. McKenna*, Harp. 302.

The proof of the testimony alleged to have been given must substantially support the narration of it in the indictment, and any substantial variance will be fatal: *Rea v. Leefe*, 2 Camp. 134; *Regina v. Southwood*, 1 Fost. & F. 356; *Roberts v. People*, 99 Ill. 275; *State v. Tappan*, 21 N. H. 56; *State v. Coffey*, 2 Murph. 320; *State v. Bradley*, 1 Hayw. 403; *State v. Ah Sam*, 7 Or. 477; *Watson v. State*, 5 Tex. App. 11; *United States v. McNeal*, 1 Gall. 337. An allegation which describes, defines, qualifies, or limits a matter material to be charged is a descriptive averment, and must be proved as laid: *State v. Langley*, 34 N. H. 529.

Where there are several distinct assignments of perjury, proof of any one of them will support the indictment: *State v. Hascall*, 6 N. H. 352; *State v. Blaisdell*, 59 Id. 328; *De Bernie v. State*, 19 Ala. 23; *Commonwealth v. Jones*, 6 Gray, 274; *Commonwealth v. McLaughlin*, 122 Mass. 449; *Harris v. People*, 64 N. Y. 148; S. C., 2 Am. Or. Rep. 416.

5. *Negating False Matter.*—The general averment that the defendant swore falsely upon the whole matter is not sufficient; the indictment must proceed by particular averments to negative that which is false: 2 Wharton's Crim. Law, sec. 1300; 2 Bishop's Crim. Proc., sec. 918; *Regina v. Whitehouse*, 3 Cox C. C. 86; *Rea v. Perrott*, 2 Maule & S. 379; *Burns v. People*, 50 Barb. 531; *State v. Mumford*, 1 Dev. 519; S. C., 17 Am. Dec. 573; *Dilcher v. State*, 39 Ohio St. 130; and see *State v. Bobbitt*, 70 N. C. 81. An indictment for perjury in an affidavit upon "information, knowledge, and belief," should negative, not only the truth of the oath, but also the information and belief: *Lambert v. People*, 76 N. Y. 220; S. C., 6 Abb. N. C. 181; 32 Am. Rep. 293.

6. *Materiality.*—The materiality of the false swearing to the issue or point of inquiry must appear from the indictment, either by a general averment or by the facts set forth: 2 Wharton's Crim. Law, sec. 1304; 2 Bishop's Crim. Proc., sec. 921; *Rea v. Dowlin*, 5 T. R. 311; *Regina v. Kington*, 2 Cox C. C. 296; *Regina v. Harvey*, 3 Id. 99; *Regina v. Scott*, 13 Id. 594; *Williams v. State*, 69 Ala. 551; *Nelson v. State*, 32 Ark. 193; *People v. Brilliant*, 58 Cal. 214; *People v. Kelly*, 59 Id. 372; *Robinson v. State*, 18 Fla. 898; *Stevens v. State*, 18 Id. 902; *Hembree v. State*, 52 Ga. 242; S. C., 1 Am. Or. Rep. 504; *Morrell v. People*, 32 Ill. 499; *Pollard v. People*, 69 Id. 148; *Kimmel v. People*, 93 Id. 457; *Johnson v. People*, 94 Id. 505; *Weather v. State*, 2 Blackf. 278; *State v. Hall*, 7 Id. 25; *State v. Johnson*, 7 Id. 49; *State v. Flagg*, 25 Id. 243; *State v. McCormick*, 52 Id. 169; *Bark v. State*, 81 Id. 128; *State v. Maxwell*, 28 La. Ann. 361; *Commonwealth v. Knight*, 12 Mass. 273; S. C., 7 Am. Dec. 72; *Commonwealth v. Byron*, 14 Gray, 31; *People v. Collier*, 1 Mich. 137; S. C., 43 Am. Dec. 699; *Hoch v. People*, 3 Mich. 552; *People v. Gaige*, 26 Id. 30; *Fleet v. People*, 25 Id. 491; *Hinch v. State*, 2 Mo. 158; *State v. Bailey*, 24 Id. 350; *State v. Holden*, 48 Id. 93; *State v. Keel*, 54 Id. 182; *State v. Shanks*, 66 Id. 560; *State v. Case*, 81 Id. 450; *State v. Dayton*, 23 N. J. L. 49; S. C., 53 Am. Dec. 270; *State v. Beard*, 25 Id. 384; *Campbell v. People*, 8 Wend. 636; *Wood v. People*, 59 N. Y. 117; *Guston v. People*, 61 Barb. 35; S. C., 4 Lans. 457; *People v. Grimshaw*, 53 Hun, 505; *State v. Ammons*, 3 Murph. 123; *State v. Dodd*, 3 Id. 226; *Dilcher v. State*, 39 Ohio St. 130; *State v. Boushu*, 3 Heisk. 29; *State v. Mumford*, 1 Dev. 519; S. C., 17 Am. Dec.

573; *State v. Hayward*, 1 Nott & McC. 546; *State v. Chandler*, 42 Tex. 446; *Smith v. State*, 1 Tex. App. 620; *Lawrence v. State*, 2 Id. 479; *Massie v. State*, 5 Id. 81; *Martinez v. State*, 7 Id. 394; *Mattingly v. State*, 8 Id. 345; *Donahue State*, 14 Id. 638; *State v. Chamberlain*, 30 Vt. 559; *Commonwealth v. Pickering*, 8 Gratt. 628; S. C., 56 Am. Dec. 158; *People v. Burroughs*, 1 Park. Cr. 211; *United States v. McHenry*, 6 Blatchf. 503; but it is sufficient if the materiality appear in either of these two modes. An averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to," is not a good averment of materiality: *Regina v. Goodfellow*, Car. & M. 569.

EVIDENCE. — A peculiarity in the evidence of the offense of perjury relates to the number and corroboration of the witnesses. The old rule required two witnesses for a conviction, "because otherwise there would be nothing more than the oath of one man against another, upon which the jury could not safely convict": 1 Greenl. Ev., sec. 257; but it is sufficient by the modern doctrine, either that there are two witnesses, or one witness and corroborating circumstances: 1 Id. 257; 2 Bishop's Crim. Proc., sec. 927; 2 Wharton's Crim. Law, sec. 1319; *Regina v. Yates*, Car. & M. 132; *Regina v. Muscot*, 10 Mod. 192; *Regina v. Boulter*, 5 Cox C. C. 543; S. C., 2 Den. C. C. 396; *Regina v. Hook*, 8 Cox C. C. 5; *Regina v. Brathwaite*, 8 Id. 254; *Regina v. Hare*, 13 Id. 174; *Williams v. State*, 68 Ala. 551; *Peterson v. State*, 74 Id. 34; *People v. Davis*, 61 Cal. 536; *McClarkin v. State*, 20 Fla. 879; *State v. Raymond*, 20 Iowa, 582; *Commonwealth v. Parker*, 2 Oush. 212; *Commonwealth v. Butland*, 119 Mass. 317; *Newbit v. Statuck*, 35 Me. 315; S. C., 58 Am. Dec. 706; *Pare v. State*, 59 Miss. 474; *State v. Head*, 87 Mo. 252; S. C., 1 Am. Crim. Rep. 502; *People v. Stone*, 32 Hun, 41; *Williams v. Commonwealth*, 91 Pa. St. 493; *State v. Hayward*, 1 Nott & McC. 546; *Anderson v. State*, 20 Tex. App. 312; *Cox v. State*, 13 Id. 479; *Gabrielsky v. State*, 13 Id. 428; *State v. Miller*, 24 W. Va. 802. The corroborating evidence must go to material testimony adduced by the state, and not to testimony in some distinct and immaterial matter: *State v. Buie*, 43 Tex. 532; but it is not necessary that it should amount to a direct contradiction of the statement made by the prisoner, upon which the perjury is assigned: *Regina v. Tawey*, 8 Cox C. C. 328. It may be circumstantial: *Hernandez v. State*, 18 Tex. App. 134; S. C., 51 Am. Rep. 296; and it need not be of sufficient force to equal the positive testimony of another witness, or such as would require the jury to convict in a case in which a single witness is sufficient: *Cruse v. State*, 10 Ohio St. 258. If an indictment contains several assignments of perjury, in order to convict on any one, there must be either two witnesses, or one witness and corroborating circumstances: *Williams v. Commonwealth*, 91 Pa. St. 493. But it is not necessary to prove by two witnesses every fact which goes to make out the assignment of perjury: *Regina v. Roberts*, 2 Car. & K. 607. The direct oath of one witness, and the declarations or statements of the prisoner himself, may be sufficient to warrant a conviction: *State v. Moller*, 1 Dev. 263; *Dodge v. State*, 24 N. J. L. 455, 461; *Vance v. State*, 62 Miss. 137. But he cannot be convicted if the evidence adduced merely consists of two opposing statements made by the prisoner, without proof which one was false: *Freeman v. State*, 19 Fla. 552; S. C., 4 Am. Crim. Rep. 470; *Schwartz v. Commonwealth*, 27 Gratt. 1025; S. C., 21 Am. Rep. 365; 2 Am. Crim. Rep. 410; *Rhodes v. Commonwealth*, 78 Va. 692; *United States v. Mayer*, Deady, 127; and see ante, "Intent."

A living witness, however, may be dispensed with, and documentary or written evidence relied upon to convict of perjury under the following circum-

stances: where a person is charged with perjury by falsely swearing to a fact directly disproved by documentary or written testimony springing from himself, with circumstances showing the corrupt intent; where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath being proved to have been taken corruptly; and where the party has been charged with taking an oath contrary to what he must necessarily have known to have been the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony found in the possession of the defendant, and which has been treated by him as containing the evidence of the facts recited in it: *United States v. Wood*, 14 Pet. 430; 2 Wharton's Crim. Law, sec. 1321; 1 Greenl. Ev., sec. 258; and see *People v. Burden*, 9 Barb. 467, 476.

The evidence of a single witness is sufficient to prove that the defendant swore to the facts charged in the indictment: *Commonwealth v. Pollard*, 13 Met. 225; *State v. Hayward*, 1 Nott & McC. 546; *State v. Wood*, 17 Iowa, 18.

It is necessary for the prosecution to prove the whole of the defendant's evidence, given as a witness: *Res v. Jones*, Peake, 37; but in proving what the prisoner orally testified, it is not necessary that it be proved *ipssimis verbis*: 3 Greenl. Ev., sec. 194; *Res v. Manton*, 3 Car. & P. 498; *Taylor v. State*, 48 Ala. 157. It is sufficient to prove substantially what he said.

Parol testimony of evidence given by a witness *ex vivo*, before a committing magistrate, or before a jury, is admissible: *People v. Curtis*, 50 Cal. 95; *Commonwealth v. Carol*, 105 Mass. 582; *Commonwealth v. Hatfield*, 107 Id. 227.

Secondary evidence is admissible of a lost written instrument on which perjury is assigned: *Regina v. Milnes*, 2 Fost. & F. 10; but oral evidence of a false affidavit is not admissible, where there is no showing that neither the original nor a certified copy of it can be produced: *State v. Kirkpatrick*, 32 Ark. 117.

SUBORNATION OF PERJURY. — To constitute subornation of perjury, which is an offense at the common law, the party charged must have procured the commission of the perjury, by inciting, instigating, or persuading the guilty party to commit the crime: 1 Hawk. P. C., c. 69, sec. 10; 3 Russell on Crimes, 9th Am. ed., 50; 2 Wharton's Crim. Law, sec. 1329; 2 Bishop's Crim. Law, sec. 1197; *Commonwealth v. Douglass*, 5 Met. 241. The solicited perjury must have been actually committed: 2 Wharton's Crim. Law, sec. 1329; 2 Bishop's Crim. Proc., sec. 1021; *Maybush v. Commonwealth*, 29 Gratt. 857; and this must appear in the indictment: *Regina v. Darby*, 7 Mod. 100; *United States v. Wilson*, 4 Blatchf. 391; *United States v. Evans*, 19 Fed. Rep. 912; S. C., 2 West Coast Rep. 611. The suborner must also be aware that the person suborned intended to commit perjury. If, therefore, the party charged with subornation knew that the testimony of the witness would be false, but did not know that the witness would willfully testify to a fact knowing it to be false, he cannot be convicted of the crime charged: *Commonwealth v. Douglass*, *supra*; *Stewart v. State*, 22 Ohio St. 477. In subornation of perjury, the same rules as to materiality of testimony prevail as in perjury: *Commonwealth v. Smith*, 11 Allen, 243.

The indictment must aver that the defendant knew that the testimony which he instigated the person suborned to give was false: *United States v. Dennee*, 3 Woods, 39; *United States v. Evans*, *supra*; *Stewart v. State*, *supra*; and that he knew that it would be intentionally and willfully false: *Id.* It must also be averred that the false testimony was given in a judicial proceeding:

State v. Simons, 30 Vt. 620; in a court having jurisdiction: *United States v. Wilcox*, *supra*.

The record of conviction of the solicited person is not enough of itself to sustain a conviction of the suborner: See *Rex v. Baily*, 1 Leach C. O. 454; nor is the testimony of the perjured witness sufficient without corroboration: *People v. Evans*, 40 N. Y. 1.

ATTEMPTS TO COMMIT PERJURY AND TO SUBORN. — An attempt to commit perjury is indictable, on the same reasoning as are attempts to commit other offenses: 2 Wharton's Crim. Law, sec. 1328; *Rex v. Taylor*, Holt, 534; and see *Regina v. Stone*, Dears. 251; *Regina v. Chapman*, 1 Den. C. O. 432; S. C., Temp. & M. 90; *Regina v. Hodgkiss*, L. R. 1 C. O. 212; and when the complete offense is not proved, the defendant may be indicted for the attempt: *Regina v. Stone*, *supra*.

Attempts to induce a witness to give particular testimony, irrespective of the truth, are also indictable: 2 Wharton's Crim. Law, sec. 1332; *Regina v. Darby*, 7 Med. 100; *Ex parte Overton*, 2 Rose, 257; *Jackson v. State*, 43 Tex. 421; although the witness had not been served with a subpoena: *State v. Keyes*, 8 Vt. 57; but the attempt must be connected with litigation, actual or prospective: *State v. Joquin*, 69 Me. 218; S. C., 2 Am. Crim. Rep. 650. It is not necessary, in an indictment for attempting to suborn a witness, that the fact which the defendant attempted to procure the witness to swear to should be stated specifically: *State v. Holding*, 1 McCord, 31; but the indictment should expressly or otherwise allege the materiality of the testimony which the defendant solicited: *State v. Teppen*, 58 N. H. 152.

CIVIL ACTION CANNOT BE MAINTAINED AGAINST WITNESS FOR PERJURY, whereby the plaintiff lost an action or recovered less than he otherwise might have done: *Danforth v. Sympeon*, Cro. Eliz. 520; S. C., Owen, 158; 2 And. 47; *Harding v. Bodman*, Hutt. 11; *Dunlap v. Glidden*, 31 Me. 435; S. C., 52 Am. Dec. 625; *Cunningham v. Brown*, 18 Vt. 123; S. C., 46 Am. Dec. 149; *Freeman on Judgments*, sec. 289; and see *Page v. Camp*, Kirby, 7; nor against the defendant for making a false affidavit in chancery that the plaintiff made a rescue, by reason of which the plaintiff was imprisoned and put to great expense: *Myres v. Sedgewicks*, Cro. Jac. 601; S. C., 2 Rolle, 197, *sub nom. Aire v. Sedgewicks*; nor against a defendant who, being committed to jail under an execution in favor of the plaintiff, made application to take the poor-debtor's oath, and upon his examination willfully and falsely swore that he had no property, and by means of the oath was discharged from arrest: *Phelps v. Stearns*, 4 Gray, 105; S. C., 64 Am. Dec. 61. Nor will the action lie against a person for suborning a witness to swear falsely: *Bostwick v. Lewis*, 2 Day, 447; *Smith v. Lewis*, 3 Johns. 157; S. C., 3 Am. Dec. 469; *Parker v. Huntington*, 7 Gray, 36; S. C., 66 Am. Dec. 455. If an action cannot be maintained against a witness for giving perjured testimony, *a fortiori* it will not lie against a witness merely from accidental and unintentional false swearing on his part: *Bell v. Senneff*, 53 Ill. 122.

CUMMINGS v. LONG.

[16 IOWA, 41.]

JUDGMENT LIEN DOES NOT ATTACH TO PREMISES HELD BY JUDGMENT DEBTOR AS HOMESTEAD, either while used as such, or after sale and transfer of possession, if the premises were used as a homestead before the debt upon which judgment was rendered was contracted.

ENTRY OF JUDGMENT DOES NOT OPERATE AS CONSTRUCTIVE NOTICE OF EXTENSION OF JUDGMENT against the defendants not included in the entry, under the Iowa code of 1851, where the entry is made in the record-book and in the judgment docket in the name of one of the defendants only, with the addition of "*et al.*" to the name.

ACTION to restrain the sale under execution of certain premises. On September 15, 1855, certain persons, Hayden, Keeler, and McCall, made their note to the defendant, John Long, payable March 15, 1856. Long recovered judgment on the note against the makers, on April 10, 1857. The judgment was entered in the record-book and in the judgment docket under the title "John Long v. Samuel Hayden et al." On May 25, 1855, McCall purchased lots 7 and 8, in block 27, in Boonsboro, and on June 7, 1856, he purchased lots 5 and 6, in the same block. On November 2, 1857, McCall and wife conveyed the lots to one Ward, who thereafter conveyed them to the complainant. The premises were occupied and used by McCall as a homestead, it seems, from the time of his purchase. In 1861 Long procured an execution to be levied upon the premises. The complainant obtained an injunction to restrain the sale. The injunction was afterwards dissolved, and the complainant appeals.

I. J. Mitchell, for the appellant.

John A. Hull, for the appellees.

By Court, WRIGHT, C. J. Upon what ground the injunction was dissolved, in this case, does not appear from the record. Neither do counsel, in their argument, advise us of the point ruled in the court below. One or two matters have prominence, however, and will receive attention.

Assuming that lots 7 and 8 were purchased "as the homestead" of McCall, at the time he took title (May 25, 1855), they were not liable to the payment of Long's judgment while used as such, for the debt upon which it was rendered was contracted afterwards, to wit, September 15, 1855. And the sale of these premises to Ward, in November, 1857, did not make them liable to said judgment; in other words, the lien

of said judgment did not attach, upon the sale and surrender of the homestead and its possession. This point was expressly ruled in *Lamb v. Shays*, 14 Iowa, 567.

The other lots, however, were purchased after the debt to Long was contracted, and being conveyed after the judgment, were subject to the lien, if said judgment was so rendered and entered up as to operate as constructive notice of its existence. If not thus entered, then, though neither of the lots may have, within the meaning of the law, constituted the homestead of McCall, still Ward, and the complainant, as his grantee, would take the same divested of said supposed lien.

And so far as the record before us discloses the facts, we feel quite clear in holding that complainant and his grantee did not have constructive notice of this judgment. By the code of 1851, it was provided that the clerk of the district court should keep certain books, which, together with the original papers in the causes adjudicated or pending therein, constituted the records. Among these books were the following: First, a book containing the entries of the proceedings of the court, which may be known as the record-book, and which is to have an index referring to each proceeding and each cause, under the name of the parties, both plaintiff and defendant, and under the name of each person named in either party; second, a book containing an abstract of the judgments, having, in separate and appropriate columns, the names of the parties, the date of the judgments, the damages recovered, costs, the date of the issuance and return of executions, with the entry of satisfaction, and other memoranda; which book may be known as the "judgment docket," and is to have an index like that required for the record-book: Secs. 144, 145.

To enter a judgment in the record-book, and carry the same forward into the judgment docket, under the title of *A B v. C D et al.*, without an index referring to each of the parties named as defendants, would not operate as notice to third persons, of who were included therein as such defendants. Conceding that without the index such an entry would be good as to the property of C D (or in this case Hayden). it would by no means follow that it would have the same effect as to his co-defendants. The language of the statute is explicit, that the index must refer to all the parties, under the name of each person named as plaintiff or defendant. The several provisions of our statute regulating the registry of

deeds and the entry of judgments, the whole theory of our legislation upon the subject of constructive notice by matters of record, forbid that a judgment entered as this one was, without indexing, should affect strangers, with knowledge of who were included in an affix so general and indefinite.

Other questions of minor importance have been discussed by counsel, but the foregoing constitute the body of the case. None of the other equities urged would avail to grant or refuse the relief asked.

If the facts are as we have supposed, the injunction should have been made perpetual. As the case is before us, however, upon the pleadings alone, which give but a very indefinite idea of the true or actual claims of the respective parties, we shall remand it, with leave to plead anew, or to take such other steps as may lead to a complete adjustment of the rights of the respective parties, not inconsistent with this opinion

JUDGMENT LIEN, WHETHER ATTACHES TO HOMESTEAD: See *Hoyt v. Howe*, 62 Am. Dec. 705, and note; *Folsom v. Clark*, 80 Id. 429; *Tillotson v. Millard*, 82 Id. 112.

IMPERFECT ENTRY OF NAMES IN JUDGMENT DOCKET AS NOTION OF JUDGMENT: See note to *Schooler v. Ashurst*, 13 Am. Dec. 233; *Myer v. Fegaly*, 80 Id. 534; *Heil and Lauer's Appeal*, 80 Id. 590. The principal case was approved but distinguished in *Foreman v. Higham*, 35 Iowa, 384, in holding that where land is sold in one county under execution on a judgment rendered in another county, the recording of the sheriff's deed will operate as constructive notice, although no transcript of the judgment was filed in the county where the land lay and the sale occurred; and see *McGinnis v. Edgell*, 39 Id. 423.

THE PRINCIPAL CASE IS CITED in *Reeves v. Sebern*, 16 Iowa, 237, S. C., post, p. 513, to the point that the whole current of judicial decisions in Iowa has ever and most wisely been against secret constructive liens, especially when these are set up against purchasers.

STREET v. BEAL.

[16 IOWA, 68.]

PURCHASER OF PORTION OF MORTGAGED PREMISES CANNOT REDEEM WITHOUT paying the whole mortgage debt.

SUBSEQUENT PURCHASERS AND ENCUMBRANCERS ARE PROPER BUT NOT NECESSARY PARTIES in foreclosure proceedings.

FORECLOSURE SALE IS NOT INVALID BECAUSE PREMISES WERE NOT SOLD IN PARCELS, according to subdivisions made after the execution of the mortgage.

ACTION to set aside a deed and to redeem. In July, 1856, the defendants, Beal and Hyatt, sold to one Gray thirty-six acres of land, each of the defendants taking back a mortgage upon one undivided half of the land, to secure payment of the purchase-money. Gray afterwards died, and his interest was transferred to one Benton. Benton laid off the land into town lots, as an addition to the city of Council Bluffs, and lots 1, 2, and 3, in block 12, were sold to one Andrews. The complainant, in April, 1860, obtained a quitclaim deed of these lots from one to whom they were sold at a sheriff's sale, in enforcing a mechanic's lien. In December, 1860, the defendants foreclosed their mortgages, and the entire mortgaged premises were sold, and purchased by the defendants. The complainant seeks to have the sheriff's deed to the defendants set aside, and to redeem lots 1, 2, and 3 by paying a proper proportion of the mortgage debt, claiming that the sale of the mortgaged premises was invalid because not made in parcels, and because the complainant was not made a party to the foreclosure proceedings. The court, at the hearing, granted the relief prayed for, and the defendants appeal.

Larimer, for the appellants.

Frank Street, for the appellee.

By Court, *Low*, J. The case, as made by the bill and answers, is not varied by the evidence taken and submitted. The bill is without equity, and should have been dismissed.

If, in equity, the plaintiff has the right to redeem lots 1, 2, and 3, under the circumstances stated in the bill, by paying the proportional value which they bear to the whole mortgaged premises, still it does not appear from the face of the bill, or the evidence, that he offered to do so, or that he is ready or willing to do so now, except from the vaguest implication. But it may be remarked, as a matter of law and equity, that he possessed no such right; nor were the defendants bound to accept money for a partial redemption had it been tendered.

The doctrine upon the subject will be found settled against the plaintiff's pretended claim, in 1 *Hilliard on Mortgages*, c. 15, secs. 81 and 82; also in the case of *Taylor v. Porter*, 7 Mass. 355; *Gibson v. Crehore*, 5 Pick. 148; *Smith v. Kelley*, 27 Me. 237 [46 Am. Dec. 595]; *Johnson v. Candage*, 31 Id. 28. The rule seems to be very well settled that a purchaser of a portion of the mortgaged property cannot redeem the mortgage without paying the whole debt; in which event, it may be

stated, he will stand in the place of the party whose interest in the estate he discharges, and will hold it till the others interested with him pay their shares of the debt according to the proportional value of the respective parties.

But the plaintiff further claims this right of a partial redemption, upon the ground that the judgment of foreclosure was void as to his interest in the mortgaged premises, because he had not been made a party to the proceeding. In the case of *Heimstreet v. Winnie*, 10 Iowa, 430, we held just to the reverse of this proposition, to the effect that, whilst it was certainly regular and good practice to make all persons, whether senior or junior encumbrancers, parties in a foreclosure proceeding, for reasons therein stated, yet that it was not indispensable, and would not vitiate the proceeding if it was not done.

The property mortgaged was a single tract of land of thirty-six acres, as it was described in the mortgage, so it was sold by the sheriff under the foreclosure. The objection that it was thus sold as a whole, and not in parcels, according to its subdivisions, cannot avail, for the reason that the mortgagees were not parties to the subdivision thereof into town lots, the same having been done by third parties, long after the execution of the mortgage. Besides, it is not pretended that the whole mortgaged property is, or was, worth more than the debt, so, in no event, was the plaintiff prejudiced thereby. An order will be entered in this court, dismissing the plaintiff's suit, at his costs, without prejudice.

Reversed.

PURCHASER OF PORTION OF MORTGAGED PREMISES CANNOT REDEM without paying the whole mortgage debt: *Smith v. Kelley*, 46 Am. Dec. 595; *Wood v. Goodwin*, 77 Id. 259. The principal case is cited to this effect in *Knowles v. Rablin*, 20 Iowa, 104; *Douglass v. Bishop*, 27 Id. 216; but see it distinguished in *Dukes v. Turner*, 44 Id. 579, where a part of the land had been sold by the mortgagee to other purchasers.

SUBSEQUENT PURCHASERS AND ENCUMBRANCERS, WHETHER NECESSARY OR PROPER PARTIES IN FORECLOSURE SUITS: See *Whitney v. Higgins*, 70 Am. Dec. 748; *Childs v. Childs*, 75 Id. 512; *Goodenow v. Ewer*, 76 Id. 540; *Boggs v. Fowler*, 76 Id. 561; *San Francisco v. Lawton*, 79 Id. 186, and the notes thereto. Subsequent purchasers and encumbrancers are proper but not indispensable parties in foreclosure proceedings: *Shields v. Keys*, 24 Iowa, 307; *Blake v. Black*, 55 Id. 256. A decree of foreclosure and sale is not void, therefore, because a subsequent purchaser of part of the mortgaged premises was not made a party: *Douglass v. Bishop*, 27 Id. 216. But subsequent purchasers and encumbrancers, if not made parties, are not bound by the foreclosure: *Gower v. Winchester*, 33 Id. 305. The principal case is cited to the foregoing propositions.

MORTGAGED PREMISES, WHEN SHOULD BE SOLD IN PARCELS: *Grapengether v. Fiferbury*, 74 Am. Dec. 336, and note; *Chespie v. Smith*, 81 Id. 328; *Lay v. Gibson*, 81 Id. 487.

BURNAP v. COOK.

[16 IOWA, 149.]

HUSBAND AND WIFE MUST CONCUR IN DEED OR MORTGAGE OF HOMESTEAD, in order that it may have any validity, under the Iowa Revision of 1860. HOMESTEAD RIGHT IS SUBORDINATE TO THAT OF VENDOR for his unpaid purchase-money.

MORTGAGES OF HOMESTEAD IS NOT SUBROGATED TO VENDOR'S RIGHTS AS TO PURCHASE-MONEY, so that the mortgage is valid, where, after the purchase of the land and the execution of a mortgage thereon to the vendor to secure the purchase-money, and the use of the land as a homestead, the husband became bound as surety for another, and subsequently assumed payment of the debt and executed the mortgage of the homestead alone to secure payment thereof, in consideration of receiving a credit of a like amount, obtained by the principal debtor from the vendor, on the purchase-money notes.

VENDOR'S IMPLIED LIEN FOR PURCHASE-MONEY IS MERGED OR WAIVED, in general, by taking a mortgage as security.

WIFE CANNOT BE AFFECTED BY DECREE IN PROCEEDING TO FORECLOSE MORTGAGE ON HOMESTEAD, to which she was not a party.

ACTION to foreclose a deed of trust. The cause was referred to a master to report the facts. On May 21, 1855, Ezra Leland conveyed the premises in question, consisting of 160 acres, to Moses V. Butler, who executed his notes to Leland for the price, amounting to two thousand four hundred dollars, and secured the same by a mortgage on the premises, made by himself and wife. About July 1, 1855, Butler and his wife commenced to occupy the forty acres in dispute as their homestead. In September 1855, one Levi Leland, having applied for a divorce from his wife, Ann Leland, was obliged to secure to her the sum of seven hundred dollars, and he procured Butler to sign notes to that amount, as surety, payable to her. Butler, afterwards becoming uneasy with reference to his suretyship, applied to Levi Leland for indemnity against loss, whereupon Levi Leland made an arrangement with Ezra Leland, by which a credit of seven hundred dollars was indorsed on Butler's notes to Ezra Leland, and Butler assumed the payment of a like sum to Ann Leland, who surrendered up her old notes, paid her one hundred dollars, and gave her a new note for six hundred dollars, securing the same by a mortgage on the premises. Butler's wife did not sign the mortgage, Ann

Leland saying at the time that she was willing to take it without his wife's signing it. Butler afterwards paid off the mortgage to Ezra Leland; but the mortgage to Ann Leland was foreclosed, and the defendant, William L. Cook, became the owner by virtue of the foreclosure sale. Mrs. Butler was not made a party to this foreclosure proceeding. On December 19, 1859, Cook conveyed the premises by deed of trust to one Van Wyck, to secure a debt due to the complainant, G. C. Burnap. Burnap filed a petition to foreclose his trust deed, making Cook, Butler, and Mrs. Butler defendants. The court entered a decree of foreclosure as to the 120 acres, but dismissed the petition as to the forty acres, on the ground of the superiority of the homestead right therein over any rights possessed by the complainant. The complainant appealed from the latter portion of the decree.

Clarke and Davis, for the appellant.

Rush Clark, for the appellees.

By Court, DILLON, J. By recurring to the facts above found, it will be seen that Butler and wife commenced the occupation of the forty acres in dispute as their homestead about July 1, 1855, and some months antecedent the execution of what is termed the Ann Leland mortgage. It will also be seen that the plaintiff's rights depend upon those of Cook, the trustor in the deed of trust, which is the foundation of the present suit. Cook's title to the homestead forty, is derived under and rests upon the mortgage, which Butler alone, without the concurrence of his wife, and at a time when the land in controversy was actually occupied as his homestead, executed to Ann Leland. By the express provision of the statute, no conveyance of the homestead, whether by deed or mortgage, is of any validity unless the husband and wife concur in and sign the same: *Revision*, sec. 2279; *Alley v. Bay*, 9 Iowa, 509; *Yost v. Devault*, 9 Id. 60; *Williams v. Swetland*, 10 Id. 51; *Larson v. Reynolds*, 18 Id. 579.

It is plain, therefore, that the homestead right, as to the forty acres in which it is claimed, was in no wise affected by the Ann Leland mortgage, unless it shall be found that the debt to Ann Leland was for the purchase-money, or if not, that it is in equity to be considered as standing in the place of, or as being invested with, the attributes of a purchase-money debt. It is settled that the homestead right is subordinate to the right of the vendor for his unpaid purchase-money: *Christy*

v. *Dyer*, 14 Iowa, 488; *Cole v. Gill*, 14 Id. 527; 1 Am. Law Reg., N. S., 715, and cases cited.

And the appellant's counsel, in the very thorough and carefully prepared argument which they have submitted, place their claim for a reversal of the decree, so far as it exempts the homestead forty from liability to the plaintiff's debt, expressly on the ground "that the Ann Leland mortgage was for a portion of the purchase-money, and therefore the homestead right could not affect it." Or stated in other terms, they insist, under the facts reported by the referee, that Ann Leland, by virtue of her mortgage, was the equitable assignee to that extent of Ezra Leland, the vendor of Butler, and as such assignee she ought to stand in his place and be clothed with all his rights. In support of this position, we are referred to *Swift v. Kraemer*, 13 Cal. 526 [78 Am. Dec. 603]; *Carr v. Caldwell*, 10 Id. 385 [70 Am. Dec. 740]; and *Lassen v. Vance*, 8 Id. 271 [68 Am. Dec. 322]. As these cases are relied on with so much confidence by the plaintiff, it is proper briefly to notice them. *Swift v. Kraemer*, *supra*, was where a prior valid mortgage existed upon the premises, at and before the time they became a homestead, and where a new mortgage was afterwards executed by the husband alone, to a person who paid off the first mortgage and caused it to be released, the release of the old and the execution of the new mortgage being on the same day, that is, being contemporaneous acts, and it was held that such new mortgage, being in equity treated as an assignment of the first mortgage, was valid, though the wife did not join therein.

In *Carr v. Caldwell*, 10 Cal. 385 [70 Am. Dec. 740], above cited, the homestead premises were about to be sold on a decree for the purchase-money, whereupon the husband borrowed of a third person (Carr) money to satisfy the decree, and which was actually applied for that purpose. At the same time, and as part of the same transaction, the husband alone executed a mortgage of the premises, and this was adjudged valid. *Lassen v. Vance*, 8 Id. 271 [68 Am. Dec. 322], was in substance this: The husband, who resided on the place as a tenant, purchased the same, and to enable him to do so borrowed the whole purchase-money from another person, and without his wife joining, executed a mortgage to secure the money thus borrowed, simultaneously with his receiving a deed, and the homestead right was held to be subordinate to the rights of the mortgagee.

Now, without denying, or even calling in question, the correctness of these decisions upon the facts of the respective cases in which they were made, it seems to us that the present case is, in several important respects, clearly distinguishable from them. We do not understand those cases to lay down the broad and unqualified proposition that a man who advances money to a debtor to pay off a prior debt, is, irrespective of the intentions, and without regard to the equities of the parties, entitled to all the rights of the creditor thus paid off.

For example: Would a person, advancing money in this state upon mortgage, since the appraisement law, to a debtor, to enable him to pay off a mortgage made before that law was enacted, be entitled, as a matter of legal right, to claim that, as the mortgage which he loaned money to cancel was exempt from the effect of that statute, that therefore his mortgage, though made since the passage of that law, would likewise stand free from its operation? As a rule, this question would have to be negatively answered. In applying the doctrine of subrogation, equity will do it so as to carry out, rather than contravene, the actual or imputed intentions of the parties, and so as to advance substantial justice. In the case at bar, Ezra Leland held the notes of Butler for two thousand four hundred dollars, given for the purchase of the quarter-section of land. While he so held them, Butler became bound as surety for one Levi Leland to Ann Leland for seven hundred dollars. This debt to Ann arose out of a transaction wholly independent of the purchase of the land. The liability of Butler to both Ezra Leland and Ann Leland co-existed for some time. In other words, Butler became bound to Ann Leland as surety some time before she received her mortgage from him.

In this respect this case differs, in a most essential particular, from the California cases above cited; for in all of those cases it is a fact much insisted upon in the opinions, that the creation of one liability to pay the other, and the actual payment of the other, were concurrent acts, parts of one and the same transaction. It does not appear, except, perhaps, inferentially, that the execution of the Ann Leland mortgage by Butler was even simultaneous with his assumption of the debt as principal.

The facts show that Butler, becoming uneasy with reference to his suretyship, applied to his principal (Levi Leland) for

indemnity; and thereupon Levi and not Ann Leland made an arrangement with Ezra, by which he indorsed seven hundred dollars on the purchase-money notes of Butler, and the latter assumed the payment of a like amount to Ann; and to secure her, he alone executed (she being "willing to take it without his wife's signing it") the mortgage under which Cook afterwards obtained his title. It does not appear what the consideration was which passed from Levi to Ezra at the time the latter made the indorsement of seven hundred dollars, nor is it perhaps material. How, under this state of facts, could Ann claim to be the assignee of a portion of the purchase-money, or of the vendor's rights? What were Ezra's rights as vendor? He had an express mortgage for the whole of his unpaid purchase-money; and this would probably be held, except in very special circumstances, to merge or waive any implied lien which he would otherwise have: *Little v. Brown*, 2 Leigh, 853, 855; *Harris v. Harlan*, 14 Ind. 439.

The taking by the original vendor, or by one standing in his place, of a new mortgage, might not amount to a waiver of the implied lien, if there existed equitable reasons for preserving it, as in *Boos v. Ewing*, 17 Ohio, 500 [49 Am. Dec. 478]; and see *Dillon v. Byrne*, 5 Cal. 455; *Barnes v. Gay*, 7 Iowa, 28. And yet, even the vendor himself may waive his right, so as to leave the homestead right paramount: See on this point, *Phelps v. Conover*, 25 Ill. 309; Sugden on Vendors and Purchasers, c. 18.

No facts are shown in this case why Ezra Leland should not be considered as having waived his implied lien as vendor by accepting a mortgage security.

It would therefore be proper to conclude that Ezra Leland had the precise rights which his express mortgage gave him, no reasons or equity being shown why he should have any other or greater rights.

And the assignment of the notes secured thereby would entitle the assignee to the benefit of the mortgage. But Ezra made no assignment of his notes, or any part thereof. If he had, they would probably have been assigned to Levi, with whom he contracted, and not to Ann Leland, with whom he did not contract. We do not see that Ezra did anything which, by any fair process of reasoning, can be construed into an assignment in favor of Ann. Suppose the balance of his debt of two thousand four hundred dollars had never been paid, can it be maintained that Ann Leland would be entitled, as his assignee, to have her

seven-hundred-dollars share in the security of the first mortgage? We think not. And in this particular the case is different from those in California. Ezra Leland had no transaction with Ann. She is not in privity with him. Her debt against Levi had in its inception no relation whatever, and in its history only an accidental connection with the purchase of the land by Butler of Ezra. They are substantially disconnected transactions. Her rights were intended to be just those which her express mortgage would give her. Her attention seemed to have been challenged to the rights of Mrs. Butler, and she was willing to, and in fact did, take a mortgage in which Mrs. Butler did not join. This mortgage was valid as to 120 acres, and would have been valid as to the remaining forty, had it not at that time, and for some months before, been the homestead of her mortgagor and his family.

Her debt was no portion of the purchase-money, but had an entirely different origin. She was not the assignee of the vendor in fact, nor has it been shown that she has any claim to be so considered in law or in equity. She took her mortgage subject to the unpaid residue of the first mortgage, and subject to any rights of Mrs. Butler, and it only executes the intention of all parties to hold that it shall remain subject to those rights.

It follows, then, that the mortgage to Ann Leland was, as to the homestead forty, of no validity whatever, by reason of the non-joinder of Mrs. Butler.

As she is not shown to have been a party to its subsequent foreclosure, the decree and sale thereunder were inoperative as to her, and conveyed no title to the homestead premises to Cook, and consequently he could convey none to the plaintiff. Mrs. Butler cannot be affected by any decree to which she was not made a party: *Larson v. Reynolds*, 13 Iowa, 579; *Wisner v. Farnham*, 2 Mich. 472; *Revalk v. Kraemer*, 8 Cal. 66 [68 Am. Dec. 304]; *Tadlock v. Eccles*, 20 Tex. 782 [78 Am. Dec. 213]; 1 Am. Law Reg., N. S., 710.

The decree of the court below was right, and it is therefore affirmed.

HUSBAND AND WIFE MUST CONCUR IN AND SIGN DEED OR MORTGAGE OF HOMESTEAD: *Smith v. Williamson*, 55 Am. Dec. 762; *Lee v. Kingsbury*, 62 Id. 546; *Poole v. Gerrard*, 65 Id. 481, and note; *Foot v. Devault*, 66 Id. 92; *Stewart v. Mackey*, 67 Id. 609; *Revalk v. Kraemer*, 68 Id. 304; *Dickson v. Charn*, 71 Id. 382; *Brewer v. Wall*, 76 Id. 76; *Best v. Allen*, 81 Id. 338; *Larsen v. Reynolds*, 81 Id. 444; and see *Sharp v. Bailey*, 81 Id. 489.

HOMESTEAD RIGHT IS SUBORDINATE TO THAT OF VENDOR FOR PURCHASE-MONEY: *Christy v. Dyer*, 81 Am. Dec. 493; and see *Lassen v. Vance*, 68 Id. 322; *Carr v. Caldwell*, 70 Id. 740; *Swift v. Kraemer*, 73 Id. 603.

MORTGAGES OF HOMESTEAD, WHEN SUBROGATED TO VENDOR'S RIGHTS: See *Lassen v. Vance*, 68 Am. Dec. 322; *Carr v. Caldwell*, 70 Id. 740; *Swift v. Kraemer*, 73 Id. 603.

VENDOR'S LIEN FOR PURCHASE-MONEY, WHETHER WAIVED BY TAKING SECURITY: See *Manly v. Slason*, 52 Am. Dec. 60, and note; *Dibbler v. Mitchell*, 77 Id. 99.

WIFE IS NOT BOUND BY DECREE IN FORECLOSURE PROCEEDINGS OF HOMESTEAD to which she was not a party: *Resalk v. Kraemer*, 68 Am. Dec. 304; *Tudlock v. Eekes*, 73 Id. 213, 216; *Larson v. Reynolds*, 81 Id. 444.

REEVES v. SEBERN.

[16 Iowa, 284.]

EXECUTION IS LIEN UPON CHATTELS ONLY FROM ACTUAL LEVY.

TRANSACTION IN SALE, AND WILL BE UPHOLD, if bona fide, as against the vendor's creditors, although it was agreed that if, when the goods were sold by the vendee, more should be realized than the price paid by them, the excess, after deducting the expenses of sale, should be credited to the vendors.

PLEDGER'S RIGHT IS SUPERIOR TO LIEN OF EXECUTION LEVIED UPON PROPERTY PLEDGED, by an officer who had notice of the pledge.

ACTION to recover the possession of goods. The cause was referred to a referee. The facts are stated in the opinion.

O. H. Conklin, for the appellants.

J. C. Traer, for the appellees.

By Court, DILLON, J. 1. The real parties in interest in this contest are the plaintiffs and Hughes, Adams, & Co., whose execution against Kirkpatrick and Haworth, the defendant, Sebern, as sheriff, levied upon the goods in controversy. The plaintiffs certainly, and probably Hughes, Adams, & Co., were non-residents, and acted through their agents and attorneys.

Traer & Co. acted for the plaintiffs, and on the 29th of March, 1862, they made, as agents for the plaintiffs (as will be more fully alluded to in another part of this opinion), the alleged contract with Kirkpatrick (the successor of Kirkpatrick and Haworth), for the purchase of the goods in question.

The referee finds, as a fact, that the execution in favor of Hughes, Adams, & Co. was "in the defendant's hands for service before the agreement between Traer and Kirkpatrick, in regard to the purchase of the goods, was made." But the said

writ was not levied until nearly a month after the said agreement, viz., not till April 24, 1862.

The referee further finds that the sale was free of fraud, and also that "Traer and Kirkpatrick both had knowledge that the execution was in the sheriff's hands for service at the time they entered into the agreement aforesaid." The defendant now claims that the execution, though not levied, was a lien upon the goods and chattels of the debtor. We are aware of no decision in this state fixing the time when the goods of an execution defendant are bound, whether from the teste of the writ, or from its delivery to the officer, or from actual levy only. This subject is now settled by statute, which provides that execution shall bind only from the time of levy: Laws, 1862, p. 231. This act was not in force at the date of the transaction now in question, and hence it becomes necessary to state what the law was before the act was passed.

At common law, the writ of *fi. fa.* bound the chattels of the defendant from its teste: 8 Bouv. Inst. 573, 574; Arch. Civ. Pl., tit. Execution; *Lutterloh v. Powell*, 1 Hayw. (N. C.) 396; *Sheppard v. Collins*, 2 Id. 57; *Stamps v. Irvine*, 2 Hawks, 232; *Beckerdite v. Arnold*, 3 Id. 296.

As this had the unjust effect to overreach and defeat sales made even before the writ was delivered to the sheriff, it was remedied by the statute of 29 Charles II., which made the writ binding from the time of its delivery to the sheriff to be executed. We have very few, if any, decisions as to what the common law in this country is, because the subject is, in most of the states, regulated by express statute. Thus, in New York, the statute of 29 Charles is re-enacted expressly: *Ray v. Birdseye*, 5 Denio, 624; see also *Hotchkiss v. McVickar*, 12 Johns. 403. So in Indiana: *Pete v. Swann*, 7 Blackf. 501; *McCall v. Trevor*, 4 Id. 496; *Wolfe v. Wolfe*, 4 Ind. 255. So in Illinois: *Marshall v. Cunningham*, 13 Ill. 20; *Dodge v. Mack*, 22 Id. 93. So in Kentucky: *Tabb v. Harris*, 4 Bibb, 81; *Arberry v. Noland*, 2 J. J. Marsh. 421. So in Florida: *Love v. Williams*, 4 Fla. 126; and Maryland: *Furlong v. Edwards*, 3 Md. 99; and Alabama: *McMahan v. Green*, 12 Ala. 71 [46 Am. Dec. 242]; *Jordan v. Mead*, 12 Id. 247; *Andress v. Roberts*, 18 Id. 387. In Missouri, as between two officers, the first levy holds, though the writ was delivered last: *Field v. Milburn*, 9 Mo. 492. In California and Ohio, by statute, the lien is from levy only. In North Carolina, where the common law, as a body, is adopted, the lien is from the teste: *Harding v. Spivey*, 8 Ired. 63, and cases *supra*; and

Tennessee follows North Carolina: *Union Bank v. McClung*, 9 Humph. 91; *Wells v. Ragland*, 1 Swan, 304.

In the absence of statute, we must conclude that the execution is a lien either from its test, as at common law, or only from actual levy. We do not feel bound to adopt the unreasonable and unjust rule of the ancient common law, so unjust, indeed, that it had to be remedied by statute.

It does not accord with the policy of our laws, nor harmonize with decisions on kindred subjects. The whole current of judicial decisions in this state, has ever, and we think most wisely, been against secret constructive liens, especially when these are set up against purchasers: *Barney v. McCarty*, 15 Iowa, 510; *Barney v. Little*, 15 Id. 527; and *Cummings v. Long*, 16 Id. 41; *Jones v. Peasley*, 3 G. Greene, 52; *Gimble v. Ackley*, 12 Iowa, 27. And we are not mistaken in saying that the professional sentiment in this state has always been that executions were not liens on chattels until actual levy.

This was the opinion of the court below, and in this respect there is no error.

2. It is next claimed by the appellants that the transaction under which the plaintiffs claim did not amount to a sale of the goods.

The testimony before the referee was not before the district court. The finding of the referee, that there was a sale, is therefore conclusive upon this point. He finds that Traer, as agent for the plaintiffs, agreed to take the goods in question, and credit their judgment against Kirkpatrick and Haworth with \$300 or \$350. He also finds, "that upon the completion of such agreement, the said Traer and the said Kirkpatrick fastened up the storeroom, locked the front door thereof, and Kirkpatrick passed the key over to Traer, as the agent of the plaintiffs." "I also find that the goods were worth six hundred dollars. That there was a further agreement between them, that if the goods should sell for more than the amount that Traer agreed to credit on the plaintiffs' judgment after paying the expenses of sale," such excess was also to be credited.

Taking all these findings together, they show a sale of the goods for \$300 or \$350. The further agreement, that if when sold more should be realized, that this excess, after deducting the expenses of sale, should be allowed and credited to Kirkpatrick and Haworth, did not deprive the transaction of

the nature and quality of a sale, especially as the referee has found that there was no fraud.

To a *bona fide* arrangement of this kind, we can see no objection, nor does such a stipulation for an additional contingent consideration transmute *ex necessitate* a sale into a pledge or mortgage.

But suppose it did, the referee has found that the sheriff "had actual knowledge of the agreement between Traer and Kirkpatrick, at the time he made the levy on the goods in controversy." If there was a valid pledge of these goods to the plaintiffs, and the defendant had notice of this before he levied, the plaintiffs, under our statute, and decisions under it, would have the better right. Notice is equivalent to recording, and this, whether the transaction is a sale, pledge, or a mortgage: Revision, sec. 2201; *McGarran v. Haupt*, 9 Iowa, 82; *Crawford v. Burton*, 6 Id. 476; *Miller v. Bryan*, 8 Id. 58; *Kuhn v. Graves*, 9 Id. 303; *Wilhelmi v. Leonard*, 13 Id. 830.

The statutes of other states, including New York, are different, and hence the case of *Ray v. Birdseye*, 5 Denio, 619, cited by appellant's counsel, is not applicable under our statute.

Without setting forth the findings of the referee, or the correspondence between the plaintiff and Traer & Co. *in extenso*, it is sufficient to state that, upon a careful examination, we are unanimously of the opinion that the agents had authority to make the contract upon which the plaintiffs base their right to maintain the present action.

Affirmed.

EXECUTION IS LIEN FROM WHAT TIME: See *Johnson v. Gorkum*, 65 Am. Dec. 501, note; *Davis v. Onoak*, 68 Id. 182. A judgment lien does not attach to personal property, in Iowa, until actual levy: *Lathrop v. Brown*, 23 Iowa, 48, citing the principal case.

BUELL v. BUCKINGHAM.

[18 IOWA, 284.]

PURCHASE OF PROPERTY BY TRUSTEE OF CESTUI QUE TRUST IS NOT VOID BUT VOIDABLE; although such a sale will not only be set aside for fraud, but upon a very slight showing of advantage or bad faith; but when it is clear that the *cestui qui trust* intended that the trustee should buy, and there is no fraud, concealment, or advantage taken by the trustee of information acquired by him as such, the purchase will be upheld and enforced.

MAJORITY OF BARE QUORUM OF BOARD OF DIRECTORS MAY BIND CORPORATION.

ABSOLUTE SALE BY INSOLVENT DESTOR OF ALL HIS PROPERTY IS VALID, if made in good faith, and for a valuable consideration, without any contingent interest remaining in him.

DIRECTORS MAY MAKE VALID SALE OF REAL ESTATE OF CORPORATION under a general power to make contracts.

ACTION to enjoin a sale under execution. At a meeting of the board of directors of the Lyons Steam Mill Manufacturing Company, on February 27, 1858, the mill property of the corporation was sold to its president, Elijah Buell, in consideration of an indebtedness by the corporation to him of \$7,647.75, for money advanced by him for the corporation in building the mills, and an agreement by him to pay other debts of the corporation, amounting to \$1,872.57, which he afterwards paid. Besides this, Buell had sold land to the corporation for \$2,000, to be paid for in stock, which had not been paid at the time. The consideration expressed in the deed was \$12,000. The property was worth at the time, according to the testimony of Robert Spear, the secretary, between \$5,000 and \$6,000. The directors present at the meeting were Elijah Buell, Robert Buell, and Robert Spear, constituting a bare quorum under the by-laws, but being the only stockholders at the time. Buell afterwards sold the property to the plaintiff. In March, 1860, the defendants, who were general creditors of the corporation at the time of the transfer to Buell, recovered a judgment against the corporation, and levied an execution on the mill property. The plaintiff sought to enjoin the sale, and at the trial obtained a perpetual injunction. The defendants appealed.

A. R. Cotton, for the appellants.

Grant and Smith, for the appellee.

By Court, *COLE, J.* 1. There is no showing of any actual fraud on the part of Elijah Buell, in his purchase of the property from the board of directors. His position, as one of the board, was that of a trustee or guardian of the rights and interests of the stockholders in the corporation, and his purchase, while occupying that relation, cannot be regarded in a more unfavorable light than a purchase by a trustee of the property of his *cestui que trust*. The rule is well settled, that a purchase of property by a trustee of his *cestui que trust* is not void in equity, but only voidable at the election of the *cestui que trust*. A court of equity will scrutinize such a transaction closely, and will not only set it aside for fraud, but will do so upon

a very slight showing of advantage or of bad faith. But when it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, no concealment, and no advantage taken by the trustee of information acquired by him as such, the purchase will be upheld and enforced.

In this case, it appears that Elijah Buell purchased the property at the request of the other directors, who, together with himself, constituted all the stockholders; that he paid nearly, or quite, twice the value of the property, and although the debt due him was considerably more than the real value of the property, yet he agreed to, and did pay, for the corporation near two thousand dollars more, besides surrendering his claim for the purchase price of the land upon which the mills were erected. In view of the facts, then, that the purchase made by Elijah Buell was at the instance of the *cestui que trust*, for a full and valuable consideration, and without any fraud, concealment, or advantage taken of his position, such purchase will not be set aside on account of his position as director or trustee.

2. A further question is, however, presented in this case, as to the power of a bare quorum of the board of directors to make a sale of the property of the corporation to one of their number. Section 3 of the by-laws of the corporation provides that the president and any two of the directors shall form a quorum for the transaction of business, and that a less number may adjourn, etc. In this case, although the requisite number of directors was present, Elijah Buell was disqualified from acting in the matter of the sale to himself; and the question then is, Can a majority of the quorum, which is itself but a bare majority, do a binding act? Upon this point Chancellor Kent says: "There is a distinction taken between a corporate act to be done by a select and definite body, as by a board of directors, and one to be performed by the constituent members. In the latter case, a majority of those who appear may act; but in the former, a majority of the definite body must be present, and then a majority of the quorum may decide": 2 Kent's Com. 293. Mr. Dane illustrates the same rule as follows: "If the charter requires twelve common councilmen to elect or do an act, seven of them, at least, must be present, though four of the seven may give the vote," etc.: 5 Dane's Abr. 150; see also Angell and Ames on Corporations, sec. 571; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124 [43 Am. Dec. 457]; *Sargent v. Webster*, 18 Met. 497 [46 Am. Dec. 743]; *In re*

Union Ins. Co., 22 Wend. 591; *Ex parte Willcocks*, 7 Cow. 402 [17 Am. Dec. 525].

It follows, then, in the light of these authorities, that since the president and two of the directors constituted a quorum, it was competent for two, being a majority of that quorum, to bind the corporation; and if two were able to act, even as against the opposing vote of the other, they could, *a fortiori*, act without his concurrence. Again, the ordinary duties of the president are to preside, determine questions of order, give the casting vote in case of a tie, etc.; and since the vote of the directors was unanimous, there was no occasion or opportunity for the president to cast his vote, even if he had not been disqualified; and the contract of sale was made by just as many directors as was required by the by-laws, or as it was possible to have in the corporation as constituted.

3. There is no evidence in the case that the corporation was insolvent, or that the sale to Elijah Buell embraced all its property; but if such facts were shown, since the transaction was an absolute sale in good faith for a valuable consideration, and not a mortgage, or pledge, or assignment, with any contingent interest remaining in the grantor, it cannot, under the former decisions of this court, be held to be a general assignment, and therefore void: Code of 1851, sec. 977; *Cowles v. Ricketts*, 1 Iowa, 582; *Fromme v. Jones*, 18 Id. 474.

4. The objection that the directors had no authority to sell this real estate, for the reason that the power to sell real estate was not expressly mentioned in the articles of incorporation, is not well founded. The law under which this corporation was organized, in defining the powers which such corporation should possess, expressly confers the power "to make contracts, acquire and transfer property, possessing the same powers in such respects as private individuals now enjoy": Code of 1851, sec. 673. Subdivision 6, article 9, of the by-laws, provides "that said corporation is hereby empowered to make contracts, purchase, receive, and hold such real estate as may be necessary and convenient in accomplishing the objects for which the corporation is created."

It is thought that the grant of power to "make contracts" is quite broad enough to give the authority to make the contract of sale in this case.

DILLON, J. The purchase of the mill property by Elijah Buell of the company is free from any taint of actual fraud. He was an admitted creditor on the books of the company to

the extent of \$7,647.75. Besides this, they owed him for debts contracted for the company nearly two thousand dollars more; and these sums, with interest, amounted, at the date of the purchase, to about twelve thousand dollars. In payment of this, he received the deed of the property on the 27th of February, 1858, the cash value of which, according to the testimony of Spear, was five thousand or six thousand dollars.

It is claimed that the sale of the property to Elijah Buell was invalid, because he was one of the directors who made the sale and authorized the execution of the deed. This is the great and only question in the case. It is not free from doubt, both upon reason and upon authority. I proceed to state, as concisely as may be, my views of the case. At the time of the sale, February 27, 1858, the defendants were general creditors of the company, but had no judgment. The whole stock of the company had centered in and was owned by Elijah Buell, who was president, and Robert Spear and Robert Buell, who were directors. There were no other stockholders and no other directors in existence.

By the by-laws it was provided that "the president and any two of the directors shall form a quorum for the transaction of business."

The board of directors, then, had the exclusive power to manage the business of the company. In such cases, the sole right is in the directors, and not in the stockholders as such: *McCullough v. Moss*, 5 Denio, 575.

Certainly, as respects stockholders, and perhaps also as respects creditors, the directors (who are the trustees or agents primarily of the stockholders, who are the *cestuis que trust*) can make no valid disposition of the corporate property, except in conformity with the requisites of the articles of incorporation, the by-laws, and the general laws of the land: *Beatty v. Marine Ins. Co.*, 2 Johns. 109 [3 Am. Dec. 401]; *Hoyt v. Thompson*, 5 N. Y. 320, 331.

Three constituted a quorum. So far, all is clear. Advancing in the argument, the first proposition I lay down is, that a majority of the quorum, all being present, have the power to act, and to decide any question upon which they can act. This proposition is clear upon the authorities. Thus, in *Rex v. Monday*, Cowp. 538, Lord Mansfield, C. J., says: "When the assembly are duly met, I take it to be clear law that the corporate act may be done by the majority of those who have once regularly constituted the meeting." To the same

effect, 2 Kent's Com. 293. "A majority of the quorum may decide": Angell and Ames on Corporations, sec. 501; *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. (Mich.) 124 [43 Am. Dec. 457]; *Sargent v. Webster*, 13 Met. 497 [46 Am. Dec. 743]; *In re Union Ins. Co.*, 22 Wend. 591; *Ex parte Willcocks*, 7 Cow. 402 [17 Am. Dec. 525]; *Ex parte Rogers*, 7 Id. 530, note a. See also, as to quorums and majority in legislative proceedings on the passage of laws, *Southwark v. Palmyra R. R. Co.*, 2 Mich. 287; *State v. McBride*, 4 Mo. 303 [29 Am. Dec. 636]; *Green v. Weller*, 32 Miss. 650; *People v. Auditor*, 33 Ill. 99.

Now, if the act done was not invalid, as being contrary to the objects of the corporation (a question which will be alluded to presently), and if, as against the defendants, Elijah Buell, the purchaser, is to be counted as one of the quorum, then it is clear that the sale and deed to him are legally operative and binding upon the company, and upon all persons whomsoever. This makes it necessary to discuss the nature of the relations which Buell and the defendants respectively sustained to the corporation.

In one respect their relations were common and identical; they were both creditors. Their equities, in this respect, were equal and the same.

Being an officer in the corporation did not deprive Buell of the right to enter into competition with other creditors, and run a race of vigilance with them, availing himself in the contest of his superior knowledge, and of the advantages of his position to obtain security for or payment of his debt. He has an advantage, it is true, but it is one which results from his position, and which is known to every person who deals with and extends credit to a corporation. This is one of the causes which has operated to bring corporate companies into discredit, and may constitute a good legislative reason for giving priority to outside creditors. But the legislature must furnish the remedy. That the act of Buell was not legally or constructively fraudulent in consequence of his being an officer or member of the corporation, see *Whitwell v. Warner*, 20 Vt. 425, 444; Angell and Ames on Corporations, sec. 390; *Gordon v. Preston*, 1 Watts, 385 [26 Am. Dec. 75]; *Sargent v. Webster*, 13 Met. 497 [46 Am. Dec. 743]; *Railroad Company v. Claghorn*, 1 Spears Eq. 562.

But in addition to being a creditor, Buell sustained to the company the relation of a stockholder and director. Such companies are essentially partnerships, except in form. "The

directors are the trustees or managing partners, and the stockholders are the *cestui que trusts*, and have a joint interest in all of the property and effects of the corporation": *Per* Walworth, C., in *Robinson v. Smith*, 3 Paige, 222, 232 [24 Am. Dec. 212]; *Cunningham v. Pell*, 5 Id. 607; *Slee v. Bloom*, 19 Johns. 479 [10 Am. Dec. 273]; *Hoyt v. Thompson*, 5 N. Y. 320.

The corporation is an artificial person, owning its property, and necessarily acting by its agents; and these agents are the directors.

After much reflection, it seems to me that the correct view of Buell's position is this: He is a trustee, and the beneficiaries are the corporation, or, in other words, the stockholders; or, what is in essence the same, he is an agent and the stockholders the principal.

If this is the relation, then the rules of law applicable to purchasers by agents and trustees apply to the purchase in question. There is a manifest impropriety in allowing the same person to act as the agent of the seller and to become himself the buyer. There may be, in all such cases, a conflict between duty and interest. Acting for himself, Buell's interest would be to obtain payment. Acting for the best interests of the corporation, his disinterested and unbiased convictions of duty might be to advise against a sale of the entire property to one creditor, or against any sale at all. It is in view of these considerations that "the wise policy of the law hath put the sting of a disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation." Even these principles would not, in my judgment, apply to the case if there had been a quorum without Buell.

Now, the purchase of property by an agent or trustee, or by any person acting in a fiduciary capacity, is not void *ab origine* and absolutely. It is voidable only. It is made subject to the right of the principal or beneficiary, in a reasonable time, to say that he is not satisfied with it. It is valid in equity as well as law, unless the parties interested repudiate it, or complain of it; and these may set it aside without showing either fraud or injury: *Bank of Old Dominion v. Dubuque etc. R. R. Co.*, 8 Iowa, 277 [74 Am. Dec. 302]; *Davoue v. Fanning*, 2 Johns. Ch. 252; *Bostwick v. Atkins*, 3 N. Y. 53, 60; 1 Parsons on Contracts, 75, 76, and cases in note; 1 Lead. Cas. Eq. 167; *MacGregor v. Gardner*, 14 Iowa, 328, 335.

As the principal or parties interested may confirm the sale,

a mere stranger cannot make the objection that the trustee was the purchaser, or that the sale was irregular. The remedy belongs only "to persons who had an interest in the property before the sale, and no other person can apply to set aside the sale": *Hawley v. Cramer*, 4 Cow. 717, 744; *Edmonson v. Welsh*, 27 Ala. 578; *Foster v. Goree*, 5 Id. 428; *Hannah v. Carrington*, 18 Ark. 85; *Herbert v. Hanrick*, 16 Ala. 581; *Greenleaf v. Queen*, 1 Pet. 138; *Hillegass v. Hillegass*, 5 Pa. St. 97; *Wightman v. Doe*, 24 Miss. 675.

Adopting this as the true view, it follows that Buell's participation in the sale and purchase of the property did not make the same void. The utmost effect it could have would be to make the sale voidable at the instance of any person having an interest in the property sold. But the defendants being at that time general creditors, and having no interest in or lien upon the property, and there being no actual fraud, are not entitled to avoid the sale simply on the ground that Buell was one of the three directors necessary to constitute a quorum. This, in my judgment, is the correct view to be taken of the case. But adjudged cases go further (and it is possible some of them go too far), and sustain the purchase of Buell on broader grounds. I will refer briefly to some of them. Thus, it is held that if three persons are appointed a committee "to finish and repair a school-house" (*Geer v. School District*, 6 Vt. 76), or to superintend the building of a church, they may "as effectually bind the society by a contract concluded with one of their own number as with a stranger." The cases were confirmed in *Rogers v. Danby Universalist Society*, 19 Id. 187, where the court say: "There is, perhaps, some incongruity in thus allowing a person to act in a double capacity, as an agent for a corporation contracting with himself. But whether a majority or the whole act, the party contracted with, as well as any other, may participate in the bargain. Partiality so gross as to amount to fraud will, when sustained, defeat the contract." In these cases, the court held the objection not good, even when made by the corporation. The case of *Hayward v. Pilgrim Society*, 21 Pick. 270, shows that where the trustees are creditors of the society, and therefore interested, they may, nevertheless, vote that the treasurer execute a note to them for the amount, and it is valid.

In *Railroad Co. v. Claghorn*, 1 Spears Eq. 545, 562, the directors in a corporation indorsed certain notes, and then voted a mortgage on the property of the corporation to indem-

nify them; and no actual fraud appearing, this was adjudged valid as against other creditors, and of course as against the corporation.

The court say: "There is nothing in law or equity which forbids the directors of a corporation from contracting with it."

In the recent case of *City of St. Louis v. Alexander*, 23 Mo. 483, this same question was considered. A railroad corporation was indebted to Page and Bacon. Under the charter, four directors was the smallest number that could act. Of these four, Bacon, the creditor, was one, and the defendant, Alexander, another. A note of over one and a half million dollars was voted to Bacon, to be secured by a deed of trust on the company's property, making Alexander the trustee. The bill was filed by the city, as a stockholder. Two judges only expressed opinions, Scott, J.: "In a matter of so great amount, the law does not allow a man to judge for himself, or vote himself a trusteeship, the management of which may be a fortune." Ryland, J., was of a different opinion. He referred to the fact that directors were frequently large creditors, and to their practice in passing on their claims for payment, etc., he adds: "The right of a director to vote on a question in which he is interested would seem to be inseparable from the doctrine that a corporation may contract with him": See Angell and Ames on Corporations, sec. 233, and numerous cases cited. "I can see no reason why a member of the board of directors might not sit in the board, and without fraud, in conjunction with others, consent to an order securing a debt already due him from the corporation": *City of St. Louis v. Alexander*, 23 Mo. 528; see *Hartridge v. Rockwell*, R. M. Charl. 260, 265; and *contra*, *Van Hook v. Somerville Manufacturing Company*, 5 N. J. Eq. 137.

Without dwelling further upon these authorities. (which are the principal ones on both sides that I have met with, directly bearing on the subject), I conclude that, as all the stockholders were in the case at bar represented at the sale, and were satisfied with it, as it is not fraudulent in fact, and as the defendants were not interested in and had no lien on the property, the purchase thereof by Buell was binding upon the corporation, and is valid as to the defendants.

Nor do I accede to the correctness of another of the defendants' propositions. They contend that, as the sale to Buell embraced the whole property of the company, or at least the bulk of the property, it amounted to an assignment for the

benefit of creditors; and also, that such a sale is contrary to and would defeat the objects of the association, and therefore it is not in the power of the directors to make it. Now, this corporation possessed all the powers of a private person in regard to the disposition of its property: Code 1851, sec. 674. It had the absolute *jus disponendi*: 2 Kent's Com. 281, 282; Angell and Ames on Corporations, 186.

A private person could make a transfer of all its property in payment of one creditor, if it was done *bona fide*: *Cowles v. Ricketts*, 1 Iowa, 582.

That this corporation could do likewise through the agency of its directors, that such a disposition by them would be binding, and would not have the effect to end or dissolve the corporation, is clear upon the authorities: *Town v. Bank of River Basin*, 2 Doug. (Mich.) 530; *Revere v. Boston Copper Co.*, 15 Pick. 351; *Boston Glass Manufactory v. Langdon*, 24 Id. 49 [35 Am. Dec. 292]; *State v. Bank of Maryland*, 6 Gill & J. 205 [28 Am. Dec. 561]; *Union Bank v. Morris*, 6 Id. 363; *Catlin v. Eagle Bank*, 6 Conn. 283, 242; *Sargent v. Webster*, 13 Met. 497 [46 Am. Dec. 743]; 1 Am. Lead. Cas. 95, and other cases there cited; *Russell v. McLellan*, 14 Pick. 63.

The interesting nature of the question above discussed is the reason why I have examined some of those so well presented in the opinion of Mr. Justice Cole, which has just been pronounced. I fully concur with him in the decision of those questions which are not referred to in the foregoing opinion.

Affirmed.

CORPORATION'S PROPERTY, WHETHER MAY BE PURCHASED BY DIRECTORS: See note to *Hodges v. New England Screw Co.*, 53 Am. Dec. 642; *Hoffman Steam Coal Co. v. Cumberland Coal etc. Co.*, 77 Id. 311; and see the capacity of a trustee generally to contract with his *cestui que trust*: *Marshall v. Stephens*, 47 Id. 601. A fiduciary is not permitted to buy the trust property, except when there is the most absolute good faith and a full disclosure of all facts and circumstances, and an absence of all undue influence, advantage, or imposition: *Newcomb v. Brooks*, 16 W. Va. 61, citing the principal case.

MAJORITY OF QUORUM OF BOARD OF DIRECTORS MAY BIND CORPORATION: See *Cahill v. Kalamazoo Mut. Ins. Co.*, 43 Am. Dec. 457, and note collecting other cases; *Sargent v. Webster*, 46 Id. 743, 746.

DEBTOR MAY PREFER ONE CREDITOR TO ANOTHER: *Sommerville v. Horton*, 28 Am. Dec. 242, and note collecting prior cases; *Nixon v. Douglas*, 30 Id. 368; *Milburn v. Beach*, 55 Id. 91; *Kuykendall v. McDonald*, 57 Id. 212. The principal case is cited in *Lampson v. Arnold*, 19 Iowa, 437, to the point that an absolute conveyance by an insolvent corporation of all its property in payment of a single debt, leaving others unpaid, is valid.

HARVEY v. SPAULDING.

[18 IOWA, 337.]

JUDGMENT DEBTOR MAY REDEEM AT ANY TIME WITHIN ONE YEAR AFTER EXECUTION SALE, under the Iowa Revision of 1860, where, after a judgment became a lien upon the land, and before the land was sold under execution, the judgment debtor conveyed it, especially if his deed contains covenants against encumbrances and of warranty.

SUIT to compel the execution of a sheriff's deed. A judgment was recovered against the defendant, Spaulding, who, after the lien had attached to the land in question, conveyed the land to one Holland, by a deed containing full covenants against encumbrances and of warranty. Execution was thereafter issued upon the judgment, and the land sold by the sheriff to the plaintiff. Spaulding, one day before a year from the day of sale expired, paid into the hands of the clerk of the court the sum necessary to redeem the land from the sale. The plaintiff refused to accept the redemption, and filed this petition to compel the sheriff to execute a deed to him. The action was dismissed, and the plaintiff appeals.

John L. Harvey, for the appellant.

Cooley and Eighmey, for the appellee.

By Court, DILLON, J. The plaintiff contends that Spaulding, the judgment debtor, had no right to redeem from the sheriff's sale, because, before the sale, he had parted with all of his interest in the land, and because, at the time he sought to redeem, he had no interest whatever in the real estate. In other words, it is claimed that Spaulding was a stranger to the land, and therefore not entitled to redeem from the sale thereof under the judgment.

The question gives us no trouble. The statute expressly provides that the judgment debtor "may redeem at any time within one year from the day of sale": Revision, secs. 8352, 8342, 8358.

The plaintiff ingeniously argues that after the sale the judgment ceased to be a debt against Spaulding, and that the plaintiff in execution could not call upon him to pay it again, it being discharged. The argument is not sound. If no sale of the land to Holland had ever been made, the same argument could be used against the right of Spaulding to redeem. In the latter case Spaulding might redeem and save the land.

In the case at bar he has an equal interest in making the redemption, and thus prevent liability on his covenants.

It is also argued that the right to redeem cannot be in both Holland and Spaulding, and that the conveyance to Holland operated to assign Spaulding's right to redeem. This argument is also untenable. It does not follow that the right of redemption cannot be in both. The true view is this: Spaulding, as the judgment debtor, certainly, where as in the case at bar he has conveyed with covenants, may, as such debtor, redeem.

His grantee, by virtue of his conveyance, has such an interest in the property as would also entitle him to redeem.

Affirmed.

JUDGMENT DEBTOR MAY REDEEM FROM EXECUTION SALE, by statute, although he has conveyed the land; *Ottumwa County Bank v. Holey*, 75 Am. Dec. 347, 349, and note 361; and his grantee may also redeem: *Id.*; *Thayer v. Children*, 57 Iowa, 114, referring to the principal case.

BALLINGER v. TARBELL.

[25 IOWA, 481.]

JUDGMENT BY DEFAULT IN ACTION IN WHICH ORIGINAL NOTICE WAS NOT SERVED, NUMBER OF DAYS REQUIRED BY LAW IS ERRORNEOUS, but it cannot be questioned in a collateral proceeding.

JUDGMENT IN FAVOR OF SOLE PLAINTIFF MAY BE SET OFF AGAINST JUDGMENT IN WHICH HE IS JOINT DEFENDANT, under the Iowa Revision of 1860, which abrogates all distinctions between joint and joint and several liabilities.

JUDGMENT IS OROSEN IN ACTION, WHICH PASSES TO ASSIGNEE SUBJECT TO EQUITIES which could be asserted against it in the hands of the assignor.

ACTION praying a right of set-off. The plaintiff, Ballinger, obtained a joint judgment against Tarbell and Robertson, while Tarbell afterwards obtained a judgment against the plaintiff, which he assigned to the defendants, Claggett, Browne, and Claggett. Executions were issued upon both judgments, and a levy made upon the plaintiff's property; but no property belonging to Tarbell or Robertson could be found. The sheriff declined to set off one execution against the other, because Tarbell had assigned his claim. The court dismissed the petition, and denied the right of set-off, and the plaintiff appeals. Further facts are stated in the opinion.

Rankin and McCrary, for the appellant.

Gibson Browne, for Claggett, Browne, and Claggett.

By Court, DILLON, J. 1. It is claimed by the defendants, Claggett, Browne, and Claggett, that the judgment of the plaintiff against Tarbell and Robertson was wholly void as against Tarbell, because the justice of the peace who rendered the same had no jurisdiction of the person of the defendant, Tarbell; and this is the first question which we are called upon to determine. The plaintiff's action against Tarbell and Robertson was brought before H. H. Wilson, a justice of the peace, and the return day was fixed by the justice for the eleventh day of February, 1860. The original papers in this action were not before the court, but the transcript shows that the original notice was served by the constable on the sixth day of February, 1860, on the wife of Robertson; and as to Tarbell, the service, as recited in the justice's transcript, was as follows: "On the seventh day of February, 1860, I, H. H. Wilson, a justice of the peace, served the said notice upon John Tarbell, by reading the same to him personally in the city of Keokuk, who confessed judgment"; and on the eleventh day of February, 1860, the justice rendered judgment against the defendants, without any appearance by them. That this service, as to Tarbell, was defective, is apparent, because the statute requires five days' notice, and here were only four. It may also be defective, because served by the justice himself, and not the constable. It was therefore clearly erroneous in the justice to have rendered judgment against Tarbell on this service. It would have been, without doubt, reversed on writ of error. But it was erroneous simply, and not void. It is not a case where there is no service at all, but a case where there was a defective service. The justice erred in deciding that this service authorized him to render judgment against Tarbell; but neither Tarbell nor his assignees can question the validity of this judgment, or claim to have it treated as void in this collateral proceeding: *Bonsall v. Isett*, 14 Iowa, 309; *Cooper v. Sunderland*, 3 Id. 114 [66 Am. Dec. 52]; *Morrow v. Weed*, 4 Id. 77 [66 Am. Dec. 122]; *Boker v. Chapline*, 12 Id. 204.

The plaintiff's judgment against Tarbell was therefore valid, the same never having been set aside or reversed.

2. The next question which arises is, whether the plaintiff has a right, legal or equitable, to have his judgment against Tarbell set off against the judgment in favor of Tarbell, and assigned to Claggett, Browne, and Claggett. If Tarbell had never made the assignment to C. R. & C., would this alleged right

of set-off exist? The only reason which could be urged against it, even at law, would be that the plaintiff's judgment was a joint judgment against Tarbell and Robertson, while the judgment against the plaintiff was in favor of Tarbell alone. But this reason, under our law, as it now stands, no longer exists. The Revision, which was in force when the cause was tried below, abrogates all distinctions between joint and joint and several liabilities: Sec. 2764; and see also secs. 8328, 2880, clause 6. Under these various provisions, the plaintiff (Ballinger), when Tarbell brought his action against him, might have pleaded in set-off his prior judgment against Tarbell and Robertson. We say he might have done so, but he was not bound to pursue this course; and his failure to pursue it would not defeat the right, if it otherwise existed, to have one judgment set-off against the other.

We conclude, then, that the plaintiff's right of set-off would exist even at law as against Tarbell, and the insolvency of Tarbell would only superadd to this right those equitable rights which flow from the debtor's pecuniary irresponsibility: *Hurst v. Sheets*, 14 Iowa, 322.

The next step in our inquiries is, whether this right of the plaintiff as against Tarbell is defeated by the subsequent assignment by the latter of his judgment against the plaintiff to Claggett, Browne, and Claggett, they being *bona fide* assignees.

Tarbell was indebted to them for fees, and they allege in their answer, not that they received this assignment in payment for services rendered in obtaining the specific judgment assigned to them, though this might, perhaps, make no difference, but "for the purpose of obtaining something on their fees, for which Tarbell was indebted to them." In another portion of the answer, they allege that "they took the said assignment without any fraud, and for the purpose of obtaining fees from said Tarbell," but it is not alleged that those fees were due on account of the judgment of which they received the assignment. It is admitted that the plaintiff's judgment was rendered prior to the rendition of the judgment against him, and that Claggett, Browne, and Claggett knew of its existence at the time they received their transfer from Tarbell.

A judgment is a chose in action: *McJilton v. Love*, 13 Ill. 495 [54 Am. Dec. 449], and cases cited; *Wise v. Shepherd*, 13 Id. 41. The legislature not having invested judgments with

the qualities which attach to commercial paper, they stand upon the footing of things in action. Section 2760 of the Revision of 1860, expressly declares, that "in case of an assignment of a thing in action, the action by the assignee shall be without prejudice to any set-off or other defense existing before notice of the assignment": See also sec. 2880, cl. 6, and sec. 1796. Since the decision of this cause by the district court, the rights of the assignee of a judgment have been settled by this court in the important case of *Burtis v. Cook*, 16 Iowa, 194, and to which, and the authorities there cited, we refer. It is not necessary to renew or enlarge the argument. It must be admitted that there are *dicta* to the effect, and perhaps decisions which expressly hold, that the right of equitable set-off is defeated by a *bona fide* assignment of one of the debts: See *dictum* of Judge Stockton, in *Davis v. Milburn*, 3 Id. 170, upon which the court below probably acted. But if we are correct in the views above expressed, if the plaintiff's right of set-off is, under our statute, a legal one, it is clear that this legal right cannot be defeated by the assignment of Tarbell.

Under the statute and the decision of *Burtis v. Cook*, 16 Iowa, 194, as the plaintiff's right was available as against Tarbell, so it is equally available as against his assignees.

If the plaintiff based his right upon some equity outside of the statute, his claim might be met by some countervailing equity in the defendant; and the fact that the judgment assigned to Claggett, Browne, and Claggett was obtained by reason of their services, might, if this were a mere contest between equities, be sufficient to deny relief. But not so when the plaintiff relies upon the rights which the statute gives him, and when the statute expressly declares that the assignee takes subject to any set-off or other defense existing before notice of the assignment. It is the opinion of this court that the decree below dismissing the petition was erroneous, and the same is reversed, and the cause remanded, with directions to the district court to grant the relief prayed by the plaintiff.

Decree reversed.

JUDGMENT RENDERED ON DEFECTIVE OR IMPERFECT SERVICE IS NOT VOID, but voidable, and cannot be attacked collaterally: *Lyon v. Vanatta*, 35 Iowa, 525; *Muscatine Town Verein v. Funck*, 18 Id. 473; *Shea v. Quintin*, 30 Id. 50; *Dougherty v. McManus*, 36 Id. 659; *Bennett v. Hetherington*, 41 Id. 150; *Woodbury v. Maguire*, 42 Id. 342; *Nelson v. Becker*, 14 Kan. 510; *Muncey v. Joest*, 74 Ind. 412; and see *Kochler v. Hill*, 60 Iowa, 564; *Freeman on Judgments*,

sec. 126; but a judgment without notice is void, and not simply voidable: *Given v. Campbell*, 20 Iowa, 81. The principal case is cited to the foregoing. That a judgment cannot be impeached collaterally by showing a want of service of process, see *Tarbox v. Hayes*, 31 Am. Dec. 478, and note; *Bridgeport Savings Bank v. Eldredge*, 73 Id. 688; and see *Cooper v. Sunderland*, 66 Id. 52; *Morrow v. Weea*, 66 Id. 122.

JUDGMENTS AS SET-OFF: See *Duncan v. Bloomstock*, 13 Am. Dec. 728, and note discussing the subject; *Lee v. Lee*, 76 Id. 681, and note collecting prior cases. The principal case is cited in *Hurst v. Sheets*, 21 Iowa, 506, to the point that the right to set off one judgment against another, where the judgments are between the same parties, is not simply equitable, but a matter of legal right; and see *Struman v. Robb*, 37 Id. 313.

JUDGMENT IS CHOSE IN ACTION, and the assignee thereof stands in the shoes of the assignor: *McFilton v. Love*, 54 Am. Dec. 449, and note; *Cottle v. Cole*, 20 Iowa, 483. The rights of the assignee can mount no higher than their source: *Chapman v. Coats*, 26 Id. 292; and he takes the judgment subject to the equities which could be asserted against it in the hands of the assignor: *Hurst v. Sheets*, 21 Id. 507; *Tiffany v. Stewart*, 60 Id. 211. The principal case is cited to the foregoing points. See further, on the proposition that the assignee of a thing in action takes it subject to equities, *Warner v. Whitaker*, 72 Am. Dec. 65, and note collecting prior cases; *Adair v. Adair*, 71 Id. 779; *Bloomer v. Henderson*, 77 Id. 453; *Central Bank v. Copeland*, 81 Id. 597; *Timms v. Shannon*, 81 Id. 632. But while a judgment may for some purposes be called a chose in action, it cannot be levied upon and sold: *Osborn v. Cloud*, 23 Iowa, 108, citing the principal case.

DISTINCTION BETWEEN JOINT AND SEVERAL LIABILITIES IS ABOLISHED IN IOWA, and parties who are jointly bound on an obligation may be sued severally: *Eyerson v. Hendrie*, 22 Iowa, 484; *Allen v. Maddon*, 40 Id. 125; *Strong v. Lawrence*, 58 Id. 61; all citing the principal case.

VANNICE v. BERGEN.

[16 IOWA, 558.]

MORTGAGEE, INDUCED BY MORTGAGOR'S FRAUDULENT REPRESENTATIONS TO SURRENDER HIS MORTGAGE, MAY KEEP IT ALIVE, in equity, and enforce it, as though the surrender had not been made, as against the mortgagor, and those claiming under him, who do not part with consideration upon the faith of the discharge, and are not prejudiced thereby.

MERGER DOES NOT OCCUR WHERE MORTGAGEE PURCHASES EQUITY OF REDEMPTION, if it is to the interest of the mortgagee to keep the mortgage alive, and this can be done without prejudice to the rights of the mortgagor or of third persons.

ACTION seeking equitable relief. On April 7, 1857, Henry Vannice and his son, Albert V. Vannice, loaned the defendant, Bergen, two thousand dollars. Bergen executed two notes, each for one thousand dollars, one payable to the father, the other to the son, and secured the same by a mortgage, which was recorded September 26, 1857. On February 19, 1859,

Greene, Traer, & Co., obtained a judgment by confession against Bergen and one Chinn, for \$667.24, for a debt contracted after the execution of the mortgage. In February, 1860, Henry Vannice bought the note held by his son, and purchased the land of Bergen, agreeing to receive it in satisfaction of the mortgage debt, and to pay in addition six hundred dollars. Bergen accordingly conveyed the land to Henry Vannice by a deed dated March, 1860; and about this time, the son made the following entry on the margin of the record of the mortgage: "Received payment in full satisfaction of my interest in the within mortgage. A. V. Vannice." At the time the land was conveyed, Bergen represented that it was unencumbered; but whether Henry Vannice knew of the judgment existing against Bergen was disputed before the referee. On April 7, 1860, Greene, Traer, & Co. issued an execution on their judgment, levied upon and sold the land conveyed to Vannice, and afterwards received a sheriff's deed therefor. In December, 1860, this bill was filed, praying that the receipt of satisfaction entered by Albert V. Vannice be canceled; that the conveyance made by Bergen be set aside, and that the plaintiffs be remitted to their rights under the original mortgage, and that the same be foreclosed. Bergen, Chinn, Greene, Traer, & Co., and one Webb, who was also a judgment creditor of Bergen, were made defendants. Greene, Traer, & Co. were the only parties who answered. The bill was dismissed, and the plaintiffs appealed.

C. H. Conklin, for the appellants.

J. C. Traer, and I. M. Preston and Son, for the appellees.

By Court, WRIGHT, C. J. The validity of the judgment under which defendants claim is not a subject of much, if any, controversy in the present proceeding; and as that is substantially the sole question in another case now before us, between these parties, we need not at this time give it any attention.

That Bergen represented the land to be unencumbered at the time he conveyed the same to the plaintiff, Henry Vannice, is very well established. Whether said purchaser had actual notice of defendant's judgment at the time, is a question of more doubt. The finding of the referee on this subject is not so clear and unequivocal as in the case which follows. True, he says that the purchaser was told by Webb, one of the judgment creditors, of the existence and approximate amount of defendant's judgment, before the conveyance. But

in another part of his finding, he admits there is conflict of testimony, as the purchaser denied in his testimony, in the most positive terms, any such conversation.

This being an equitable proceeding, we hear the case *de novo*, and hence look to the testimony to ascertain the truth in the premises, and especially so where the finding is to some extent equivocal, and counsel seek to go behind it. Looking, then, at all the testimony and circumstances, we unite in the conclusion that actual notice is not established. Webb swears to it, we admit. Plaintiff as positively denies it. This conflict may be reconciled upon the hypothesis that plaintiff, who is shown to be somewhat deaf, did not hear all that was said. The other assumption would lead to the conclusion that plaintiff had sworn falsely. In addition to this, other persons were present, with reasonably fair opportunities for hearing the conversation, and swear that they heard nothing said about this judgment. Take the further fact that Bergen was quite, if not entirely, insolvent; that plaintiff paid him in property and money a sum almost equal to this judgment, over and above the amount due on his mortgage, the improbability that he would take his deed and part with his means, with actual knowledge of this encumbrance, and it seems to us that plaintiff's theory is the more probable and reasonable.

The purchase was made, then, without actual knowledge of the existence of the judgment. Plaintiff was induced, by the misrepresentations of Bergen, to take the title, and relying thereon he agreed to surrender his mortgage. And yet, by a contract thus made, as between them he is not bound, but he may be heard in equity to assert his lien, and will be allowed to revive or keep it in life and recover thereon as though the conveyance had not been made. As to this proposition we suppose there is no controversy.

The question still remains, however, whether plaintiffs have a right to treat their mortgage as unsatisfied, and to insist upon it as a lien paramount to that of defendant's judgment. In considering this question, a brief reference to some of the facts may afford us assistance.

It will be remembered that plaintiffs had the first lien upon this land. This lien never has been satisfied in any other way than by the conveyance of the land from Bergen to them. Prior to this conveyance, and while the mortgage lien was in full force, defendants recovered their judgment. As far as material, it may also be stated that the debt forming the basis

of the recovery was contracted during the existence of said lien. After the conveyance, defendants levied upon and sold the land, but advanced no money, parted with no right, except such as resulted from the satisfaction of their judgment by their purchase under the execution. Bergen was quite, if not entirely, insolvent at the time of his sale to Vannice; or at least his ability to pay defendants' demand was as great afterwards as it was before. Nor does it appear that he then had, or has had since, any property from which defendants could have made their judgment, or which has been lost to them by the act of plaintiffs, in connection with this land and their lien thereon.

Under such circumstances, we are unanimously of the opinion that plaintiffs' mortgage is not extinguished as against the said judgment creditor, so far as it covers the note of one thousand dollars, made to Henry Vannice; while a majority of us entertain the same opinion as to the note payable to the son Albert, and as a consequence, that the court below erred in confirming the report of the referee, recommending the dismissal of the bill.

As between plaintiffs and Bergen, as we have already seen, there would be no question as to their equitable right to insist upon the mortgage. For, assuming that they received a deed for the property with the understanding and upon the agreement that the mortgage debt was to be satisfied, yet this was based upon his representation, as well as the assurance and covenants of his deed, that the property was unencumbered, and therefore, if the controversy related to them alone, and it was necessary to the protection of plaintiffs' rights that the mortgage should be kept in life, equity would so order, and would not give to the mortgagee the benefit of a satisfaction procured by his own fraud and misrepresentations, such representations having been relied upon, and with apparent reason, by plaintiff. Now, is there any good equitable grounds for placing the present appellees (the judgment creditors) in any better position?

As to the general proposition, that if the mortgagee purchases the equity of redemption from the mortgagor, the mortgage, as well as the mortgage debt, is extinguished, there is of course no doubt. For, ordinarily and legally, the effect of such an arrangement is to vest the mortgagee with the whole estate, and such an entire interest is inconsistent with his claim under the mortgage: *Wickersham v. Reeves*, 1 Iowa, 413.

If, however, it was the intention to keep the mortgage alive, or if it is to the interest of the mortgagee, and it can be done without prejudice to the rights of the mortgagor or third persons, the doctrine of merger, as between them, will not apply. Ordinarily, also, nothing but payment of the debt, or an express release, will operate to discharge or satisfy the mortgage. As long as there remains a debt, the lien continues. And when an express release, or full and unqualified discharge even, has been procured by fraud, equity, as between the parties to the mortgage, will interpose and revive it, giving it full validity from the date of the original lien: *Barnes v. Camack*, 1 Barb. 892; 1 Hilliard on Mortgages, 307, 329.

This being so, we are not aware of any case which applies a different rule to a mortgagee who purchases the equity of redemption. Nor is there any reason for the application of a different rule.

Then advancing one step further, we say that a party who has not advanced any money upon the strength of such supposed release or discharge, who is not placed in any worse position by reason of his reliance upon said supposed extinguishment, or who does not show that an equity arises in his favor by such advancement or reliance, or something of that character, stands in no better position, and is entitled to no greater protection. And here it must be remembered that such third party is not to be affected by the fraud or act of the immediate parties, of which he had no actual or constructive notice. Considered in this light alone, the party claiming the continued existence of the lien could not necessarily resist the other or third lien-holder. But the proposition is, that the right of the mortgagee to recover the mortgage, as against the mortgagor, being established, the same right exists as against third persons having no better or other equities than the mortgagee; and this, without reference to the question of notice of the fraud or misrepresentations, which induced the actual or implied discharge or release of the lien.

Now, if after such discharge, without notice of the fraud, and before the revival of the encumbrance, a third party should part with his money upon the faith of such discharge, it would be manifestly wrong and inequitable to permit the revived lien to be asserted as against such intervening rights. Not so, however, when the rights did not thus intervene, or when the party has sustained no loss in consequence of relying upon the extinguishment of the lien.

But leaving the general discussion, and coming to the case before us in its actual facts, we find that the respondents were fully as able to collect their debt from Bergen after this bill was filed as before the conveyance was made to Vannice. In other words, they parted with no liens or securities from their reliance upon the satisfaction of the mortgage by the vesting of the legal title in the mortgagee; there was no change of the debtor's property to their prejudice, or otherwise; they made no new or further advancement; their judgment was simply a lien before such merger, subject to the prior mortgage; it occupies no worse position now, if that satisfaction should be set aside. If the claimed merger had not taken place, respondents would have been compelled to pay the mortgage debt before they could have obtained a good title to the land. Upon what principle is it that they shall be in a better position, or that they have a more favorable standing in an equitable forum, because the mortgagee has bought in the mortgagor's right to redeem? And especially is this inquiry pertinent when it is remembered that it is manifestly to the interest of the mortgagee to keep his lien in life, and that if he ever intended otherwise, it was because of the fraud of the mortgagor. Not only so, but it is worthy of remark that respondents claim an interest in this property, not under the mortgage, but under the mortgagor, or in his equity of redemption. This right intervenes between the right under the mortgage and the equity. If the two rights coalesce or merge, what becomes of respondents' judgment lien? When does it come in? Is it not lost in the union of the other two rights? Or if not thus lost, how can they claim that the union gives them a greater right than if they stood separately? And in this view of it, is it not essential to them that the mortgage should be kept on foot to enable them to enforce their legal or equitable rights? *Hunt v. Hunt*, 14 Pick. 374 [25 Am. Dec. 400].

And the foregoing views, if correct, when applied to the note payable to Henry Vannice, it seems to us are equally applicable to the other. It will be perceived at a glance, that the whole reasoning applies with equal force to each. The case is placed upon the ground that in equity the mortgage should be kept in life as to Bergen, and that respondents are in no position to claim any greater protection. The entry on the margin of the record by Albert V. does not change the case. It is shown, beyond all question, that he was not paid any-

thing by Bergen, but that this was a method adopted to transfer or release his interest in the security to his father. If the conveyance to the father by Bergen, under the circumstances, shall not have the effect of giving priority to respondents' judgment over the mortgage, we cannot see why this "receipt on the margin of the record" can equitably aid them. If, as to them, the mortgage was satisfied, and they can claim the benefit of the satisfaction, that is an end of the case,—the character of the evidence showing that satisfaction being quite immaterial.

But it is claimed that defendants sold the land under their execution, bought it in, and thus satisfied their judgment before any steps were taken to revive this mortgage. And here it is not our purpose to enter upon the discussion of the question, whether at law defendants would stand in the attitude of innocent purchasers without notice. The point is one upon which the authorities differ, and some of which will be found referred to in *Parker v. Pierce*, 16 Iowa, 227. This is an equitable proceeding, and we hold that defendants are to be affected by the equities existing between plaintiffs and Bergen, under the peculiar circumstances of the case, without discussing or determining whether a plaintiff purchasing at sheriff's sale the property of his debtor, is, as a legal rule, to be treated like any other purchaser. It must be remembered that they not only bid in the property themselves, that they paid no money, but that during the time that their judgment has been apparently satisfied, they have lost nothing, for their debtor has been in no condition to pay. They could have made nothing by execution. If he had been able to pay, and his property in the mean time was lost to them, a very different question would arise. But if plaintiffs' right to priority is recognized, defendants may have the entry of satisfaction on their judgment set aside, and the judgment will stand unaffected by any of the proceedings under the execution. All the costs made by said sale plaintiffs propose to and should pay, with interest. Under such circumstances, we do not believe any rule or principle is violated in reviving this mortgage. And it is certainly inequitable to give defendants a priority to which they have no pretense of right, save upon the technical ground that plaintiffs' debt has been satisfied by their purchase of the equity of redemption.

The decree below will be reversed, and the cause remanded, with instructions to set aside the conveyance from Bergen to

Vannice, in accordance with the prayer of the bill; to ascertain the amount due and unpaid on the mortgage debt; to enter a judgment for the amount thus found, with an order of foreclosure, and that respondents be required to pay the amount thus found to be due, within a day to be fixed after said decree, and in default thereof that execution issue, as provided by law, for the collection thereof. Defendants may, at their option, have an order setting aside the entry of satisfaction on their judgment, and reinstating it as fully as if no sale had been made under said execution. Plaintiffs are required, however, to pay to defendants, or the clerk of the court below, for their use, all the costs of said sale, including fees for execution, making the sheriff's deed, and recording the same, with interest thereon at ten per cent (they so offering by their bill), before being entitled to the decree herein contemplated. And the court will make such other and further orders, not inconsistent with this opinion, as may be necessary and proper under the case made to settle the rights of the respective parties.

Reversed.

DILLON, J., delivered a dissenting opinion.

CANCELLATION OR RELEASE OF MORTGAGE PROCURED BY FRAUD WILL BE VACATED IN EQUITY: *Poore v. Price*, 27 Am. Dec. 582, and note. The principal case is followed on this point in *Loomis v. Hudson*, 18 Iowa, 417; and see *Skiff v. Cross*, 21 Id. 461; and if the release is procured by the fraud of the mortgagor, subsequent attaching creditors obtain no better rights than the mortgagor: *Hoffman v. Wilhelm*, 68 Id. 514, citing the principal case. So, if the mortgage is canceled or discharged by mistake, it may be decreed to be still in force: *Bruce v. Bonney*, 71 Am. Dec. 739, and note; *Banta v. Vreeland*, 82 Id. 269, and note.

MERGER, WHEN OCCURS BY MORTGAGEE'S BECOMING OWNER OF EQUITY OF REDEMPTION: See *Millsbaugh v. McBride*, 34 Am. Dec. 360; *Duncan v. Drury*, 49 Id. 565, and notes to these cases. As a general proposition, if the mortgagee purchases the equity of redemption from the mortgagor, the mortgage, as well as the mortgage debt, is extinguished: *Byington v. Fountain*, 61 Iowa, 515; *Bowling v. Cook*, 39 Id. 203; but a merger will never be presumed against the equities of the parties: *McClaskey v. O'Brien*, 16 W. Va. 847; and a merger does not take place when it is the intention to keep the mortgage alive, or when it is to the interest of the mortgagee to keep it alive, and it can be done without prejudice to the rights of the mortgagor or third persons: *Hoffman v. Wilhelm*, 68 Iowa, 514; *Denham v. Sankey*, 38 Id. 271. The principal case is cited to the foregoing propositions. As to merger generally, see *Ladd v. Wiggin*, 69 Am. Dec. 551; *Moore v. Luce*, 72 Id. 629; *Pool v. Morris*, 74 Id. 68; *Campbell and Pharo's Appeal*, 78 Id. 375; *Carroll v. Ballance*, 79 Id. 354, and the notes thereto.

THE PRINCIPAL CASE IS ALSO CITED in *Walker v. Elston*, 21 Iowa, 531, *Walace v. Bartle*, 21 Id. 349, *Butterfield v. Walsh*, 21 Id. 99, 100, S. C., 36 Id.

536, to the point that a judgment creditor purchasing at execution sale will be protected against an unrecorded deed or mortgage, or outstanding equities, of which he had no notice at the time of his purchase; and see *Logan v. Taylor*, 20 Id. 300; *Lathrop v. Brown*, 23 Id. 51; but this does not apply to a case where the judgment debtor has only an equity in the land, and the purchaser takes with full knowledge that he is acquiring thereby only such an equity as the debtor has: *Churchill v. Morse*, 23 Id. 233, referring to the principal case. The principal case is further cited in *Sims v. Hammond*, 33 Id. 373, to the point that the lien of a mortgage attaches when the mortgage is delivered, and continues, unless released, until the debt is paid; in *Clinton Co. v. Cox*, 37 Id. 572, to substantially the same effect; in *Halloway v. Planser*, 20 Id. 123, to the point that the Iowa registry law does not protect attaching or judgment creditors against unrecorded deeds or mortgages, nor in equity, against such instruments, whether recorded or not, when by mistake they describe the property intended to be conveyed or encumbered; in *Hackworth v. Zollart*, 30 Id. 436, to the point that no assignment of errors is necessary on appeal in an equity cause, triable by the first method of equitable trials, because it is heard *de novo* in the supreme court; and in *Pfye v. Beers*, 18 Id. 11, to the point that a homestead right is not waived, as to judgment creditors, by a temporary absence from the homestead.

COY v. CITY COUNCIL OF LYONS.

[17 Iowa, 1.]

LEVY BY COUNCIL OF MUNICIPAL CORPORATION OF TAX FOR PAYMENT OF JUST DEBTS, at a rate not exceeding the maximum limit of its power of taxation, is not discretionary, so that they may refuse to levy such tax for the payment of a judgment duly rendered, upon which execution has been issued and returned *sulla bona*, but is a duty, the discharge of which may be enforced by *mandamus*.

CREDITOR OF MUNICIPAL CORPORATION ACQUIRES PRIORITY OVER SIMPLE CONTRACT CREDITORS, by demanding payment, and upon refusal thereof, instituting proceedings by *mandamus* to compel the levy of a tax for the payment of his debt; and taxes thus assessed should be set aside as a special fund for the payment of such debt.

IF SINGLE LEVY OF TAX TO PAY OFF JUDGMENT will not raise a sufficient fund therefor, by reason of the limitation on the power of the city council to tax beyond a certain rate, it is competent for a court, on *mandamus*, to order that additional levies be made from year to year until the entire indebtedness is discharged.

ORDER OF COURT THAT MUNICIPAL CORPORATION SHOULD LEVY TAX at certain rate not exceeding the limit of its power of taxation to pay off a judgment, without having before it *data* of the taxable property of the corporation, if erroneous in fixing a rate which would produce a larger sum than would be necessary to discharge the debt, would be merely error without prejudice to the corporation, and a levy of a less rate and satisfaction of the judgment would be a substantial compliance with the *mandamus*.

SIMPLE CONTRACT DEBT CANNOT BE MADE BASIS OF APPLICATION FOR MANDAMUS to compel the levy of a tax by a municipal corporation for

its payment while it retains its form as a simple debt, unless it was contracted under a law or vote authorizing such proceeding to enforce its payment.

IT IS DUTY OF AUTHORITIES OF MUNICIPAL CORPORATION TO LEVY AND COLLECT TAX within the limit of the power to levy taxes, sufficient for the payment of a debt which has been reduced to judgment, and which can be paid in no other way, and such tax should be set apart and applied to such purpose only.

EQUITIES ATTACHING TO DEBT ARE MERGED INTO JUDGMENT therefor, and cannot be asserted against an application for a *mandamus* to enforce the payment of the same.

APPLICATION for *mandamus* to compel a city to levy and collect a tax for the payment of petitioner's judgment against said city.

A. R. Cotton, for the appellant.

Ellis Brothers, for the appellee.

By Court, COLE, J. On the final hearing of the cause, the following facts were admitted by the parties: 1. That defendant is an incorporated city, with mayor and council; 2. That plaintiff obtained judgment as claimed; 3. That it is unpaid; 4. That an execution was duly issued and returned no property; 5. That plaintiff had duly demanded payment, and also demanded the levy and collection of a money tax sufficient to pay plaintiff's claim; 6. That defendant refused to pay or levy the tax, and also refused to pay a part in city orders, but offered to pay the whole in city orders; 7. That at no time since the judgment had there been money in the city treasury to pay it; that plaintiff is personally interested, is damaged by the delay in payment, and that the city council alone have the power to levy the tax; that the city is so otherwise indebted that all the ordinary taxes will be paid in city orders; that the taxes levied will only pay ordinary expenses and interest on city debt; 8. That about the time of demand by plaintiff the council levied a tax of five mills, when, by the city charter, a tax of ten mills could be levied; 9. That plaintiff's debt was for land for a city cemetery, and by sale of lots it could be ultimately paid without levying a tax, and that plaintiff had received the proceeds of all such sales, and defendants are willing to make such proceeds a special fund for plaintiff; 10. That the city had possession of the cemetery; and 11. That under the charter it is discretionary in the city council to levy a tax not exceeding ten mills per cent on the property within the city liable to taxation for state and county

purposes, besides three mills for road purposes, and that the city council have annually for years levied a tax under said law, and for 1862 they levied five mills on the dollar, besides road tax, and that to apply such tax to the payment of plaintiff's claim would deprive the city of the means of discharging its ordinary functions.

1. The first error assigned is, that under the law it is a matter of discretion with the council to determine the rate of tax within the maximum limit, and the court cannot control this discretion; nor is there any law or contract making it the duty of the council to levy a tax expressly to pay plaintiff's judgment.

It is true, as a general rule, and is, indeed, universal, that where a tribunal is clothed with discretion as to a particular matter, a court can, by *mandamus*, compel the tribunal to act, but cannot control its discretion in the performance of that act. But this rule is limited to tribunals having a purely discretionary power in the matter, and cannot be extended to boards or persons upon whom the law has devolved a duty which can only be performed by the exercise of discretion in a certain manner. Every person and corporation has a purely discretionary power over his and its own property; but no person or corporation is permitted, under the law, to avoid the payment of his or its just debts, which is a duty devolved upon them by the law, and which no plea of discretionary power can defeat.

Our statute very clearly recognizes this distinction as to discretionary power. Section 3761 of the Revision provides that "the writ of *mandamus* is an order of a court of competent jurisdiction, and issues from the district court, commanding an inferior tribunal, corporation, board, or person to do, or not to do, an act, the performance or omission of which the law specially enjoins as a duty resulting from an office, trust, or station." Section 3763 then further provides that "where a discretion is left to an inferior tribunal, the writ of *mandamus* can only compel it to act. It cannot control the discretion of an inferior tribunal."

This statute, by express language, limits the power of the court in controlling discretion to "inferior tribunals"; while the former section gives the court express power to compel "corporations, boards, and persons" "to do or not to do" a particular act enjoined as a resulting official duty. The city council of Lyons may have a discretion beyond the control of

courts in fixing the rate of levy for ordinary city purposes; but where a creditor has obtained a judgment which can only be paid by the levy of a particular rate of tax for a given year, a duty is thereby devolved upon the city council to levy such rate of tax, not exceeding the maximum limit, as will pay off such judgment. That duty results from the plain moral as well as legal obligation the city is under to pay its debts; and no discretion within the limits of the performance of that duty can be rightfully claimed by the city council. The discretion which they may exercise in such case is not an independent personal discretion, but a legal discretion, which they must exercise in accordance with their plain legal duty, or upon their failure so to do, the courts will, under the common law, as well as the statute, compel such performance.

2. The second error assigned is, that the court erred in directing the payment to plaintiff exclusively of the additional five-mill tax ordered to be levied; for that it was not the duty nor had the council the power to do so, nor had plaintiff any priority over other creditors of the city.

It was the duty of the city council to levy the tax, because the city owed the plaintiff the amount of the judgment, and it could, as appears by the agreed facts, be paid in no other way. The city council possess the power to levy a tax, not exceeding ten mills; and although there may be no express legislation authorizing the city council to provide a special fund, it is clearly within their power to levy the tax, and appropriate, or in advance to set apart, the proceeds of it to a particular purpose. The plaintiff, by the recovery of his judgment (which is the only one against the city), and by a demand of its payment and the levy of a tax therefor, acquired such priority over other creditors as the law affords to the diligent, and as entitles him to have his debt first paid; and an order therefor is no prejudice to or adjudication of the rights of any other simple contract creditors.

3. The third, fourth, and fifth assignments of error are fully disposed of by the foregoing disposition of the first and second.

4. The sixth assignment of error is, that the court erred in directing the city council as to the levy of an additional tax for the years subsequent to 1863, in case the five-mill tax of that year did not satisfy plaintiff's judgment.

We see no great objection to the action of the court in this particular. The plaintiff holds his judgment, and has demanded payment, and the levy of a tax to satisfy it, and brings

his action for *mandamus* to compel such levy. The defendant shows, in defense, that the city council has no authority to levy exceeding a certain rate per cent, which may not, in one year, satisfy the judgment. The object of the suit is to compel payment, and the defense only shows an inability, under the law, to levy sufficient to satisfy it in one year, but a clear ability to do it in subsequent years. The court having jurisdiction of the case, and it being within the case made, the relief sought and asked for by the petition will grant complete relief by providing for the payment of the whole debt, and will not turn the plaintiff out of court with only a partial relief, and remit him to his subsequent actions of *mandamus* for further or full relief. The law abhors a multiplicity of actions for *mandamus* as well as other kinds of actions; and where it is within the case made, and relief asked, and the court has the jurisdiction and authority to do so, it will grant full and complete relief.

5. The eighth assignment is, that the court erred in ordering a levy of five mills for 1863, without the *data* of taxable property to show how much it would yield.

No such question seems to have been made to the court below; but if it had, it is difficult to see how the decision could prejudice the defendant. The substance of the judgment is, that the defendant shall levy a tax, not exceeding the legal limit, sufficient to pay plaintiff's claim. The object is simply to pay the plaintiff's demand; and if a less rate than that specified would accomplish that object, and the city council should, by the levy of a less rate, pay off the judgment, such action would be a substantial compliance with the *mandamus*, and exempt them from attachment or other process for contempt of court or disobedience of its process. If it was error, therefore, it was error without prejudice.

6. The seventh, ninth, and tenth assignments of error were disposed of by the foregoing, they being substantially embraced in the others. Where a debt remains in its original form, as a simple contract debt, the creditor has no legal right to a *mandamus* to compel the city to levy and collect a tax for its payment, unless the debt is contracted under a special law or vote authorizing such proceeding to enforce its payment. But where the debt has been reduced to a judgment, there is then devolved upon the city authorities a perfect legal duty and obligation to provide for its payment; and if that can be done in no other way, then it must be done by the levy and

collection of a tax within the limits of the corporate authority of the city therefor; and of course such tax should be set apart and applied to the object for which it is levied.

The consideration of the debt upon which this judgment was rendered cannot affect the rights of the judgment creditor in this proceeding. The judgment was a merger of any equities which attached to the debt, and it is too late now to set them up.

Affirmed.

WHETHER AND HOW MUNICIPALITY MAY BE COMPELLED TO LEVY TAX TO PAY OBLIGATIONS WHICH ARE DUE, WHEN NO SPECIAL STATUTORY PROVISION IS MADE FOR LEVY OF SUCH TAX. — Authority to a municipal corporation to create a debt implies an obligation to pay it; and where no special mode is provided, it is implied that it is to be done in the ordinary way, by the levy and collection of taxes: *Commonwealth v. Alleghany County*, 37 Pa. St. 290; *United States v. New Orleans*, 98 U. S. 381. The duty to levy and collect taxes in such cases may be enforced by *mandamus*, though the tax be not specially enjoined by statute: *Brown v. Crego*, 32 Iowa, 498; *State v. Burbank*, 22 La. Ann. 318; *Lexington v. Mulliken*, 7 Gray, 280; *Soutter v. Madison*, 15 Wis. 30; *State v. Milwaukee*, 20 Id. 87; *Brown v. Gates*, 15 W. Va. 131; and *Iowa R. R. Co. v. Sac Co.*, 39 Iowa, 134; *Riggs v. Johnson Co.*, 6 Wall. 193, citing the principal case; and see the reasoning in *Wakely v. Muscatine*, 6 Id. 481; *Ross v. Watertown*, 19 Id. 107, cases where the tax was specially enjoined. *Mandamus* will not lie if there be a plain and complete remedy by more ordinary forms of the law. Thus, it is generally held that if plaintiff may bring suit and obtain judgment and levy execution upon it which may be effectual, *mandamus* will not lie in advance of the judgment: See the cases just cited; and *People v. Clark Co.*, 50 Ill. 213; *State v. County Judge*, 5 Iowa, 380; *State v. Davenport*, 12 Id. 335; *State v. Union Tp.*, 37 N. J. L. 84; *State v. New Orleans*, 30 La. Ann. 129; *State v. Trustees*, 61 Mo. 155; *Marsh v. Little Valley*, 64 N. Y. 112. Where the judgment cannot, under the law, be enforced by execution, *mandamus* is the only remedy: *Chicago v. Hasley*, 25 Ill. 595; *Morrison v. Hinkson*, 87 Ill. 587. In the New England states, the private property of inhabitants of towns may be taken on execution: *Beardsley v. Smith*, 16 Conn. 368; but outside of such states, in the absence of express statutory provision, no resort can be had to private property to satisfy corporate debts: *Horner v. Coffey*, 25 Miss. 434. The duty on the part of a municipality to provide for payment of a debt becomes perfect, when the creditor obtains his judgment, and then if the judgment can be paid in no other way, it must be done by levy and collection of a tax for that purpose, and this duty will be enforced by *mandamus*: *Supervisors v. United States*, 4 Wall. 435; *Frank v. San Francisco*, 21 Cal. 668; *Olney v. Harvey*, 50 Ill. 453; *Oswald v. Thedinga*, 17 Iowa, 15, citing the principal case; *State v. New Orleans*, 30 La. Ann. 705; *Schaffer v. Cadwallader*, 36 Pa. St. 126; *State v. Milwaukee*, 20 Wis. 87. After judgment, the only difference between creditors who are entitled to a tax under special statutes, and those for whom no special provision has been made, is, that the former need go no further than to obtain his judgment and make demand of payment, and then may proceed by *mandamus*, while the latter must resort to execution, or any other means he may find, for payment of his debt, before he can

have the remedy of *mandamus*. See 2 Dillon on Municipal Corporations, sec. 856. If a municipality has no power, either by express grant, or by implication, as from its general power of taxation, to pay the indebtedness by means of taxation, the authorities cannot be required, on *mandamus*, to levy a tax for that purpose: *United States v. Macon Co.*, 99 U. S. 582, discussing this point fully; and *In re Meth. Epis. Church*, 66 N. Y. 395; *United States v. New Orleans*, 98 U. S. 391. The creditor is entitled to have the whole power of the corporation exerted, if necessary, for payment of his judgment, though the city have a discretion as to the amount of tax which it may levy: *Buts v. Muscatine*, 8 Wall. 575; *Commonwealth v. Pittsburgh*, 34 Pa. St. 496. If, at the time of the city's contract, its power of taxation was unlimited, such power continues as to said contract, though a subsequent statute limits its power of taxation: *State v. New Orleans*, 36 La. Ann. 687; *Wolff v. New Orleans*, 103 U. S. 360; *Meriwether v. Garrett*, 102 Id. 472. It is held that a city may retain and apply its regular revenue to its ordinary current expenses, and this, too, as against a judgment creditor who demanded and insisted upon the application of such revenues to the payment of his judgment: *Grant v. Davenport*, 36 Iowa, 401; *French v. Burlington*, 42 Id. 618, citing the principal case. Where municipal officers fail to perform their duty to levy tax, they may be compelled under the *mandamus* to meet again, if they have adjourned, for the purpose of making such levy: *People v. Supervisors*, 8 N. Y. 317. The judgment debt cannot be questioned on the proceeding for *mandamus* to compel payment: *Wells v. Mason*, 23 W. Va. 456.

United States courts may issue such *mandamus*, but never until after judgment shall first be obtained: *Davenport v. Dodge Co.*, 105 U. S. 243; *Greene Co. v. Daniel*, 102 Id. 187; and such *mandamus* cannot be interfered with by injunction from a state court: *Riggs v. Johnson Co.*, 6 Wall. 166; *United States v. Keokuk*, 6 Id. 514.

THE PRINCIPAL CASE IS CITED as an instance of when the word "may" will be construed as "shall": *Supervisors v. United States*, 4 Wall. 446; and in *Brown v. Cargo*, 32 Iowa, 501, to the point that state courts have power to compel county officers to discharge the duties of their offices: *Brown v. Cargo*, *supra*.

MALLETT v. STONE.

[17 IOWA, 64.]

CONTRACT FOR CONSIDERATION EXCEEDING LEGAL INTEREST to forbear enforcing payment of note, which is not in itself tainted with usury, will not operate to taint the note with usury, but will render the contract void therefor, and the money paid thereon will be applied as a credit on the note.

ACTION to recover principal and interest on a promissory note, and for the foreclosure of a deed of trust to secure the same. The note and contract were legal and without any taint of usury, but at its maturity a special contract was made for the forbearance of the creditor to enforce payment in consideration of an amount exceeding legal interest.

C. Cook, for the appellant.

Ross and Bloomer, for the appellee.

By Court, *LOWE, J.* The only point for our determination is, whether the defense of usury can be successfully pleaded, under the circumstances stated, to the note sued. We think clearly not. The special contracts entered into as aforesaid after the maturity of the note to obtain further time in the payment thereof, do not, in law, relate back to the date of the original contract so as to infect its validity. The note in its inception was valid, untainted with any illegality, and it ever remained so; it was not changed or renewed so as to include the subsequent special contracts alleged to be usurious, but remained intact from these, and is now alone sued. The usury complained of pertains to the special contracts of forbearance. These, by the court below, were treated as usurious, and the money paid under them was applied as a general credit on the original contract, which we think was right, and all the defendant could reasonably ask.

The judgment will therefore be affirmed.

USURY AND LAW OF USURIOUS CONTRACTS, GENERALLY: See the extended notes to *Davis v. Garr*, 55 Am. Dec. 391, and *Sylvester v. Swan*, 81 Id. 733. The principal case is cited in *Sexton v. Murdock*, 36 Iowa, 519, to the point that to constitute a contract usurious, the receiving of illegal interest must have been in pursuance of the contract.

BEATTY v. GREGORY.

[17 Iowa, 103.]

PATROL LICENSE TO ENTER UPON AND MINE MINERAL LANDS, for a certain share of the mineral raised, for an indefinite time, and an entry under such license, and expenditure of labor and money in sinking shafts, running drifts, procuring machinery, and making other preparations for mining under such license, will give to the licensee a valid subsisting interest in the real estate which the licensor can terminate only by giving him compensation for such expenditure, or the notice necessary to terminate a tenancy at will; and the licensee may assert his right to possession, against the licensor or his subsequent lessee with notice, by ejectment.

WHETHER INTEREST OF LICENSEE IN MINING LICENSE HAS BEEN FORFEITED, terminated, or abandoned, is a question of fact upon which the parties are entitled to the verdict of a jury.

LESSEE OF MINERAL LANDS IS NOT BOUND BY PRIVATE CUSTOM OF LESSOR, unless the lease was executed with knowledge thereof by such lessee or his assignor.

GENERAL ESTABLISHED CUSTOM OF MINERS enters into and forms part of a lease of mining lands, in the absence of any express stipulation to the contrary, or of a private custom, differing therefrom, which was known to both parties.

EJECTMENT by licensee of mineral lands against the licensor and others claiming under him. The opinion states the facts.

John H. O'Neill and Alonzo Cragin, for the appellants.

Monroe and Deery, for the appellees.

By Court, DILLON, J. I. Chapter 144 of the Revision provides that "any person having a valid subsisting interest in real property, and a right to the immediate possession thereof, may recover the same by action": Sec. 3569. Assuming, for the present, that the plaintiffs' rights, as the parol licensees of Bonson, the owner, had never been forfeited or terminated, the first question is, Can they assert those rights in this form of action? Let us suppose a simple and uncomplicated case, and one which, from the testimony, we infer to be of not unfrequent occurrence: Mr. Bonson, as the owner of a large quantity of mineral lands, is applied to for the right to mine upon them. He replies: "I will give you the right you desire, you paying me as rent one sixth of all mineral discovered." Nothing is said as to the duration of the right, or the mode of termination. The miner, upon the faith of this permission, takes possession, expends his labor and money in sinking shafts, running drifts, purchasing tools, providing machinery, etc. Laying out of view any rights derivable from custom, and applying to the case (in the absence of special contract regulating the rights and duties of the respective parties) the ordinary rules of the law, can the owner instantaneously and absolutely revoke the license, so as, from that moment forward, to treat the miner as a trespasser or intruder? Most clearly not. It would be a shame and reproach to the law, if this could be done. The general principles of the law are against it: *Winter v. Brockwell*, 8 East, 308; *Wickersham v. Orr*, 9 Iowa, 253, 260 [74 Am. Dec. 348], and cases there cited; *Rerick v. Kern*, 14 Serg. & R. 267 [16 Am. Dec. 497]; S. C., 2 Am. Lead. Cas. 546, and the valuable note of the learned editors, and authorities there collected, as to executed licenses. And in the absence of an established custom, or usage, or contract, giving larger or other rights, such a miner being in possession of real estate, with the assent of the owner, would, by statute, be a

tenant at will (Revision, sec. 2216), and entitled to the rights of such a tenant, in regard to notice to quit.

Considering the importance of the lead-mining interests of Iowa, that the rights of owners and miners are wholly unregulated by statute, it is surprising that so little litigation, growing out of this great interest, has ever reached this court. And yet, in almost the only case ever before it, at all similar to the present, and which counsel seem to have overlooked, the above principles are directly asserted and enforced: *Bush v. Sullivan*, 3 G. Greene, 344 [54 Am. Dec. 506]. In that case, the defendants were in possession of the plaintiff's mineral land, by virtue of an unlimited parol license, and had made large expenditures in improving the ground, under an arrangement that the plaintiff was to have one fourth of the mineral raised, as his rent, and the plaintiff brought ejectment. There was no question of rights under a custom in the case; and the court held that the owner could not maintain his action without refunding the expenditure, or giving the notice to which a tenant at will is entitled. While some of the observations *arguendo* in that case may admit of question, the decision itself, under the facts, was just and proper. If the miner has, under such circumstances, such rights as that he cannot be ejected by the owner, it seems to us to follow that he may, by virtue thereof, assert his right to possession against the owner, and his subsequent lessee or licensee with notice, if they unjustly interfere with it. In the case at bar, the following, with the exception of an introductory statement, constituted the entire charge of the court to the jury:—

2. "To sustain this action on the part of the plaintiffs, all the evidence introduced by them tends to prove that the only interest of the plaintiffs in the premises claimed consists in a license to work and mine on the premises described in the petition, under a parol license from Richard Bonson, the owner in fee of the premises, which right so tending to be proved is a simple right to enter upon the premises, under such license, and to dig and search for lead mineral therein, and for no other purpose, and without any property in the minerals, if any, on the premises in the plaintiffs until discovered by them.

3. "In my opinion, this does not tend to prove such an interest in real estate in the premises, in the plaintiffs, as entitles them to maintain this action and recover therein. And there being no evidence before you of such a title and interest in the

plaintiffs, in the premises, as will entitle them to recover, the defendants are entitled to your verdict."

Whether the interest of the plaintiffs had ever been forfeited, terminated, or abandoned, was a question of fact for the jury, to be determined by them from the evidence under proper instructions. This question the plaintiffs, by their instructions (all of which were refused), sought to get before the jury. And whatever may be our opinion upon the evidence as it now stands, as to the abandonment of their right by the plaintiffs, we are clear that they had the right, under our statute and practice, to have this question distinctly submitted to and decided by the jury. In considering therefore whether the case ought to be reversed for error in the above charge, we must assume that the plaintiffs took possession with the consent of Bonson, expended money and labor on the faith of such consent, and that their right had never been forfeited or abandoned. On this assumption, it is our opinion that they would have such an interest in real estate as would entitle them to bring an action in this form to recover it, and thus be restored to their crevice or diggings. Such being our opinion upon the general principles of justice and law, let us now take a brief view of the authorities to see whether this opinion is in harmony with adjudged cases. The general rule is, that ejectment will lie for anything of which the sheriff can deliver possession. Therefore, it may be maintained for corporeal but not for incorporeal hereditaments: Adams on Ejectment, c. 2, pp. 18, 20, and cases. As applicable to miners and mining interests, this distinction results from the above rule; a privilege to dig, not amounting to an actual demise of the mines, is an incorporeal hereditament, and consequently ejectment will not lie: *Doe ex dem. Hanley v. Wood*, 2 Barn. & Ald. 724; *Lord Mountjoy's Case*, 4 Leon. 147; S. C., Godb. 17; *Chetham v. Williamson*, 4 East, 469; *Crocker v. Fothergill*, 2 Barn. & Ald. 661, judgment of Holroyd, J.; and see *Wilkinson v. Proud*, 11 Mees. & W. 33; and *Stoughton v. Leigh*, 1 Taunt. 402. And especially under the above authorities is this so where such license is not exclusive, and does not oust the grantor of his rights.

But a distinction in many cases is drawn between an unopened and an open mine. And the books abound with cases from a very early period which decide that ejectment will lie for mines, though another has the surface. We refer to the following: *Comyn v. Kyneto*, Cro. Jac. 150. In *Whittingham*

v. *Andrews*, 1 Salk. 255, S. C., Carth. 277, "it was not questioned [citing *Comyn v. Kyneto*, *supra*] that ejectment lies of a coal mine": *Comyn v. Wheatley*, Noy, 121; and see *Lewis v. Branthwaite*, 2 Barn. & Ald. 437; Bainbridge on Mines, 493, 494; Collier on Mines, 18; Adams on Ejectment, 20; *Doe ex dem. Hanley v. Wood*, 2 Barn. & Ald. 724, and cases cited *supra*. Many of these cases, while holding that ejectment lies for an open mine, throw no light upon the question as to the interest in the plaintiff necessary to maintain the action. On this subject Mr. Adams is of opinion (Ejectment, 20) that "when a grant of mines is so worded as not to operate as an actual demise, but only a license to dig, search for, and take metals and mineral within a certain district, it seems that a party claiming under such a grant, and who shall open and work, and be in actual possession of any mines, may, if ousted, maintain ejectment with respect to them; but he cannot maintain ejectment, either in respect of mines within the district [i. e., lying within the bounds of his privilege], which he has not opened, or which having opened, he has abandoned": See also Bainbridge on Mines, 494; Collier on Mines, 18. We are satisfied that this rule is a reasonable one, and we adopt it as being the law. The court's charge, it must be observed, omits any allusion to the material facts of possession and expenditures of money and labor by the plaintiffs under the license from Bonson. The questions in the case should have been submitted to the jury thus: Were the plaintiffs' rights forfeited or abandoned? If so, that is an end of the case; if not, that is, if those rights were still subsisting and had not been determined by abandonment or forfeiture, then, as they had taken actual possession and expended money, they would be entitled to be restored to the possession of their mining right. What they could recover as damages or rents and profits, with respect to the mineral raised by the defendants, has not been discussed by counsel, and we pass the question by as not being necessarily before us: See observations of Abbott, C.J., pp. 738, 739, in the above-cited case of *Doe ex dem. Hanley v. Wood*, 2 Barn. & Ald. 724. Our conclusion, then, on this part of the case is this: Omitting any allusion to the charge as trenching upon the province of the jury, it was, agreeably to the above views and authorities, correct as to the rights of a bare licensee without actual possession, or the right to actual possession. But the error consists in taking from the jury, against the objection of the plaintiffs, the question whether the plaintiffs had

abandoned or lost, or forfeited their actual possession, or right to actual possession. If not, the jury should have been charged that they had such an interest as would entitle them to maintain ejectment.

II. We also think the court below held too tight a rein upon the plaintiffs in refusing to allow them to show the general custom of miners. The plaintiffs offered to show what, by the general custom of miners, was the effect upon the miners' right, license, or claim, as to forfeiture by reason of a failure to work the ground, and to show that sickness or bad air would, for the time being, under the custom of miners, excuse continuous working and prevent the forfeiture of the right which would otherwise take place.

This testimony seems to have been rejected on the ground that there was a "local or private custom in regard to this particular land." This refers to the testimony of Mr. Bonson, the owner, who stated: "This rule is a uniform rule with me, that a tenant loses his right when he ceases to work." "When I know damps to exist, I do not resume the ground." "If a man was sick and unable to work for two weeks, and I knew it, I would not resume the ground." "My rules have never been written or published, I keep them only in my mind." "These are my rules as laid down in the neighborhood." "If a person comes to me to rent ground, I ask him if he knows my rules, and he says 'yes,' I say 'go to work.' If he says he does not, I tell him my rules." "I do not remember as I ever talked with Mr. Brugh [the plaintiff] about any of my rules." Mr. Brugh testified that he "did not know any of Bonson's rules, except his right to a preference of mineral obtained on his premises." Under these circumstances, the jury should, in substance, have been directed:—

1. That Bonson's private rules would not affect the plaintiffs' rights, unless they had knowledge thereof; or unless they held, as the assignees of persons who had such knowledge; and whether they or their assignors had such knowledge, would be for the jury to determine from the evidence. If the plaintiffs had such knowledge, these rules would constitute part of the contract, and evidence of any general custom inconsistent with or different from them would be disregarded.

But 2. If the plaintiffs had no knowledge of Bonson's rules, and if there was no contract with respect to the assignment or duration, forfeiture or mode of termination of the plaintiffs' rights, these matters would depend upon a general

custom in these respects, and upon the law. The custom (which is evidenced and proved by usage, 2 Parsons on Contracts, 55, 56, and notes) must be established, and not casual (though no particular length of time is necessary to establish it), uniform, and not fluctuating (when contracts are not made to the contrary), and general, that is, general among mineral land-owners and miners. The *onus* to establish such a custom is on the plaintiff. If, for example, there is an established custom, generally understood and received, that sickness or bad air, when nothing is said to the contrary, shall excuse, while it lasts, actual working, then a license given in a place where such a custom exists would be presumed to have been made with reference to it; and such a custom would be considered as being tacitly annexed to and as forming a part of the contract between the parties. The same observations will apply as to the right of the licensee to assign and sell his privilege. In the absence of any contract or established custom, the right of a licensee to dig, paying a part as rent, would, by the law, be considered personal, for otherwise a license to A would practically be one to B, and the owner's rights might be seriously affected. But a general custom recognizing the assignability of these mining rights would probably not be so unreasonable as to prevent its being upheld.

8. Where there is no special contract, and no general custom, the general rules of law govern the rights of the parties; and these, so far as they arise on the record, have already been sufficiently adverted to. The novelty and importance of the case clearly justify the space it occupies. It has been found impossible to treat it with greater brevity, and yet to treat it with clearness and precision. For the reasons above indicated, the judgment of the district court is reversed, and the cause remanded for a new trial.

Reversed.

EXECUTED PAROL LICENSE, NATURE AND EFFECT OF: See *Wickersham v. Orr*, 74 Am. Dec. 348, and note. A parol license becomes a valid and binding contract by virtue of the licensee's taking and keeping possession with the consent of the licensor: *Anderson v. Simpson*, 21 Iowa, 401; *Grant v. Davenport*, 18 Id. 190, citing the principal case. As to parol licenses for working mining lands, see *Bush v. Sullivan*, 54 Am. Dec. 506, a case somewhat similar to the principal case. A license to work mining lands, unless expressly so agreed or necessarily implied, will not be held to be exclusive, and the rights of the licensee will extend only to lands which have been worked, and of which he had actual possession: *Upton v. Brazier*, 27 Iowa,

187, citing the principal case. In *Harknell v. Burton*, 39 Id. 105, citing the principal case, it is held that a parol license for mining land is valid, and can only be terminated by compensation to the licensee, or by the notice necessary to terminate a tenancy at will, and is good against a subsequent licensee or lessee. As to the revocation of licenses, generally, see the note to *Hawle-ton v. Putnam*, 54 Am. Dec. 166; and see *Snowden v. Wilas*, 81 Id. 370, and cases cited in note. It is held that a parol executed license is irrevocable: *Rindge v. Baker*, 57 N. Y. 220; *Ganter v. Atkinson*, 35 Wis. 53; or at least until compensation for expenditures by the licensee is made: *Yanke v. Nichols*, 1 Col. 561, all citing the principal case.

MINING CUSTOMS, GENERALLY: See the extended note to *McClintock v. Bryden*, 63 Am. Dec. 103, citing many cases.

AYRES v. HARTFORD FIRE INS. CO.

[17 IOWA, 176.]

ONE HAS INSURABLE INTEREST IN REALTY, where the title bond therefor has been assigned to him, and the obligee in such bond has made valuable improvements upon such property.

ALIENATION OF INSURED PROPERTY WILL END POLICY as to assured, if he retains no further interest in the property; but if an interest is still retained, the policy, in the absence of special stipulations to the contrary, will cover and protect that interest.

UNDER CONDITION IN POLICY OF INSURANCE THAT IN CASE OF ANY SALE, TRANSFER, or change of title, in the property insured such insurance shall be void and cease, a merely nominal transfer, as collateral security for debts which are liens on the property, will not avoid the policy.

UNDER CONDITION IN INSURANCE POLICY THAT IN CASE OF ANY SALE, TRANSFER, or change of title, in the property insured, such insurance shall be void and cease, a transfer which would increase the temptation on the part of the assured to defraud the underwriter or lessen his interest in preventing a destruction of the property, will avoid the policy.

INSURANCE COMPANY IS NOT BOUND BY MERE KNOWLEDGE OF ITS AGENT, of acts which would avoid a policy, and to which he makes no objection.

ANSWER FILED FOR DEFENDANT OVER SIGNATURE OF HIS ATTORNEY IS ADMISSIBLE AS EVIDENCE, in another action, of admissions of the allegations therein set out, but its weight as evidence is to be determined by the jury.

SUPPOSED OR TECHNICAL ERROR IN OVERRULING MOTION FOR NONSUIT will not be ground for reversal of a judgment after trial on the merits.

HOLDING PROPERTY IN SECRET TRUST TO DEFRAUD CREDITORS OF REAL OWNER is not such a holding in trust as is contemplated by a condition in an insurance policy, providing that "property held in trust or on commission must be insured as such, otherwise the policy will not cover such property," and that "by property held in trust is intended property held under a deed of trust, or under the appointment of a court, or held as collateral security."

PAROL EVIDENCE IS NOT ADMISSIBLE TO SHOW THAT AGENT OF INSURANCE COMPANY failed in writing the application to take down the statements by the applicant, or changed them, if he had authority only to receive

and forward applications; but if he is authorized and does pass upon the risk in question, without submitting it to the principal, the latter is estopped from asserting that he has been misled by the representations of the application, by reason of the mistake of the agent in writing answers to questions asked.

NOTICE OF LOSS GIVEN BY THIRD PERSON FOR ASSURED, such person being interested in the policy but not the agent of the assured, is not sufficient under a stipulation that all persons shall, upon loss, deliver a particular account of loss or damages, signed by their own hands.

MERE SILENCE OF INSURANCE COMPANY WILL NOT AMOUNT TO WAIVER OF DEFECTS in proof of loss; but an objection to the proofs upon one specific ground, and silence as to another in which was the real defect, operates as a waiver of the latter.

ACTION by John Ayres upon insurance policy, to recover the balance remaining after B. F. Allen, plaintiff's assignee of a title bond to the property as collateral security, had been satisfied. The remaining facts appear in the opinion.

Finch, Clarke, and Rice, for the appellants.

S. V. White, for the appellees.

By Court, DILLON, J. The record and argument in this cause cover hundreds of pages. We will discuss the many questions arising with all possible brevity consistent with clearness.

1. Assuming that the plaintiff was the holder, by assignment from William F. Ayres, of Hall's title bond to the latter, it is plain that he had an insurable interest in the premises at the time when the insurance was effected, December 10, 1860. The debt to Hall, under the extension of time, was not then due. Valuable improvements had been made upon the land by William F. Ayres after the purchase from Hall. To all this the plaintiff was entitled, by virtue of the assignment of the title bond to him, on the payment of the purchase-money when due, subject, of course, to the claim of Allen, and possibly to other liens. By the assignment to him, he agreed to pay the purchase-money debt to Hall. This liability would remain, notwithstanding the destruction of the mill by fire. It is most obvious, therefore, that he would suffer damages if the mill should burn. Possession of property under a subsisting executory contract, which may result in title or ripen into ownership, constitutes an insurable interest, whether the purchase-money is paid or not, and will justify a recovery to the extent of injury sustained: *Columbian Ins. Co. v. Lawrence*, 2 Pet. 25; S. C., 10 Id. 507; *McGivney v. Phoenix Fire Ins. Co.*, 1 Wend. 85; *Tyler v. Etna Fire Ins. Co.*, 12 Id. 507; S. C., 6 Id. 385; 2 Am. Lead. Cas. 397, and authorities there cited.

2. One of the conditions of the policy of insurance in suit was in the following words: "And in case of any sale, transfer, or change of title in property insured by this company, or of any undivided interest therein, such insurance shall be void, and cease; and the entry of a foreclosure of a mortgage, or the levy of an execution, shall be deemed an alienation of the property."

Based upon this clause or condition in the policy, the answer sets up the following defense, viz.: "That subsequently to the date of the policy, and prior to the destruction of the mill by fire, to wit, in the month of January, 1861, the plaintiff executed an unqualified conveyance of all his right, title, and interest in and to the said steam flouring mill to one B. F. Allen, whereby the said policy became void, and the defendant avers that it had no knowledge of such transfer until after said fire." It is further alleged that at the "time of the fire, the plaintiff had no insurable interest in the property, no *bona fide* interest, no title, legal or equitable." As will be seen by the statement, the plaintiff, after the date of the policy, and before the loss, viz., January 21, 1861, made an assignment, absolute on its face, of "all his right, title, and interest" in the Hall title bond to B. F. Allen, the judgment creditor named in the policy of insurance, who was first to be paid in case of loss. William F. Ayres swore on the trial that this assignment to Allen was signed by John Ayres himself. It was shown by Allen's testimony that William F. Ayres told him he could get the bond assigned to him, and brought it back afterwards with the plaintiff's signature to the assignment of January 21, 1861. That this bond was in Allen's possession at the time of the fire, with this assignment upon it, is an undisputed fact in the case. Allen testified that he never executed to John Ayres any agreement to reassign the bond; but that he took and held the bond "as collateral, to secure him in case he paid the balance due on the bond to Hall, and also the better to secure him in his judgment against William F. Ayres." As to the purpose for which he held the bond, Allen made substantially the same statement in the "proofs of loss" required by the policy. He also stated that at the time of the fire William F. Ayres & Co. owed him \$4,866.13. Whether this was the whole amount of his judgment against Ayres & Co., or the amount due, less the credit of \$3,745, by the sale of the mill and other property, November 14, 1860, does not appear in the record before us. Under this state of facts, some difficult questions of law arise, under the special provisions of the policy in suit.

John Ayres, as we have seen, had an insurable interest at the time the insurance was effected. But this alone is not sufficient. As the contract of insurance is a personal one, not running with the land, the insured must have an interest in the property destroyed at the time of the loss. This has been settled ever since the early cases of *Lynch v. Daly*, 3 Bro. P. C. 479, and *Sadler's Co. v. Badcock*, 2 Atk. 554; see also 3 Kent's Com. 371; Angell on Insurance, sec. 193; *Dix v. Mercantile and Chicago Ins. Companies*, 22 Ill. 276. "If, therefore, the assured," says Shaw, C. J., in *Wilson v. Hill*, 8 Met. 68, "has wholly parted with his interest before the premises are burnt, and they are afterwards burnt, the underwriter incurs no obligation to pay anybody. The contract was to indemnify the assured; if he has sustained no damage, the contract is not broken": *Howard v. Albany Ins. Co.*, 3 Denio, 301. *Prima facie*, therefore, the assignment by the plaintiff to Allen, of his title bond and of all his rights therein, left him without any interest in the property covered by the policy, and consequently without any right to recover for the loss or destruction of it. To rebut this, the plaintiff offered the evidence of Allen as to the purposes for which he held the assignment of the title bond; to show that, though absolute and unconditional in form, it was nevertheless taken by him as collateral security for his debt against William F. Ayres & Co., and contingently as security for any amount which he might have to advance to Hall to secure the title. Whether parol proof of this kind would have been admissible, is not a question before us, for the reason that no objection by the defendant was made to its introduction: See *Hodges v. Tennessee Marine and Fire Ins. Co.*, 8 N. Y. 416.

We are to take it, then, as established, that Allen only held the bond as security, and that the plaintiff, subject to the specified purposes for which it was assigned to Allen, was the real owner of it. If so, he would still retain an interest in the property. If it should burn, he would still remain liable to Hall, according to the terms of the assignment by which he acquired his rights. If it should not burn, he would be entitled to a deed for the property, on payment to Hall and Allen. Agreeably to the principles above laid down, if the assured alienates the property wholly, and retains no interest therein, the policy as to him is at an end; but if an interest is still retained, the policy, in the absence of special stipulations to the contrary, will cover and protect that interest.

This is reasonable in principle, and plain upon the authorities: Angell on Insurance, sec. 193, and cases there cited.

Defendants claim that there were special stipulations to the contrary which avoided the policy, notwithstanding the plaintiff may have remained, after the assignment to Allen, equitably interested in the property. The stipulation or condition relied on for this purpose is the one above quoted, viz.: "And in case of any sale, transfer, or change of title in the property insured, . . . such insurance shall be void, and cease," etc. Under the parol testimony, which was received without objection, it cannot be contended that the assignment of the bond to Allen was a sale of the property to him. The transfer of the bond to Allen was in the nature of a mortgage, first, to secure the debt of another, viz., William F. Ayres & Co.; and secondly, to secure plaintiff's own debt to Hall (made his by accepting the assignment of the bond from William F. Ayres), provided Allen should pay it. Now, unless expressly so provided by the policy, a mortgage is not considered as an "alienation," or "sale," so as to avoid the insurance, unless it may be in the case of mutual insurance companies: *Rollins v. Columbian Ins. Co.*, 25 N. H. 200; S. P., 38 Id. 232; *Lazarus v. Commonwealth Ins. Co.*, 5 Pick. 81; *Conover v. Mutual Ins. Co.*, 3 Denio, 254; S. C., 1 N. Y. 290; Angell on Insurance, sec. 205; and see Littleton and Blatchey's Insurance Digest (a valuable work, most faithfully and conscientiously prepared), tit. Alienation, for further authorities on this point. The reason is, that a sale or alienation contemplates an absolute transfer of the title and ownership to another, whereas a mortgage only creates a lien for the security of the stipulated debt or engagement. This is especially so under our statute. The difficulty arises upon the construction of the additional words, "transfer or change of title." These mean more than a "sale," else why are they added? Is title here used as synonymous with ownership? and must the actual ownership change in order to avoid the policy? or is the policy avoided, if the form or evidence of the title is changed, provided the actual and the real ownership remains the same? One member of this court cannot take part in the settlement of this question, and the others are not entirely agreed as to the true construction of this clause.

Words of doubtful meaning, or susceptible of two fair interpretations, should, especially in view of the well-known fact that insurance companies frame the contract, be construed to

uphold rather than avoid the policy: *Wilson v. Conway Ins. Co.*, 4 R. I. 156; and on this principle two of the three judges taking part in this decision are of the opinion that the change or transfer of title, to be in violation of the policy, must be more than nominal. The object of the insurance company by this clause is, that the interest shall not change so that the assured shall have a greater temptation or motive to burn the property, or less interest and watchfulness in guarding and preserving it from destruction by fire. Any change in or transfer of the interest of the assured in the property of a nature calculated to have this effect, is in violation of the policy. But if the real ownership remains the same,—if there is no change in the fact of title, but only in the evidence of it, and if this latter change is merely nominal, and not of a nature calculated to increase the motive to burn, or diminish the motive to guard, the property from loss by fire, the policy is not violated. Apply these principles to the case in hand. It does not appear when the judgment of Allen was rendered. If rendered before the assignment of the title bond from William F. Ayres to the plaintiff, then the judgment was a lien on the whole property for the whole amount, and was a lien prior to the plaintiff's claim. The transfer of the bond to Allen by the plaintiff could not, under such circumstances, give Allen any more or greater rights than he before had, nor take away from the plaintiff any of his rights. It would be equitably really and substantially no change or transfer of the title. But if Allen, before the insurance, had caused the mill to be sold on his judgment for, say, fifteen hundred dollars, and if the plaintiff, after the insurance, and before the assignment of the bond by him to Allen, could have redeemed the property, and freed it from Allen's claim by paying that amount, then if he assigned the bond to Allen as security for a much greater sum, owing not by himself, but by another, it seems clear that his interest in the property would be changed, as he would then be placed under more temptation to defraud the underwriters, or at least have less interest in preventing the destruction of the property by fire. Such a change, we are all agreed, would avoid the policy; and one member of the court, Wright, C. J., is of the opinion that the transfer of the bond to Allen, being absolute on its face, avoided the policy *ipso facto*, irrespective of the question whether it increased Allen's rights, or diminished those of the plaintiff. The majority, however, are of the opinion above indicated, but as the record does not enable us

to ascertain the facts, and as the judgment must be reversed for other reasons, we can only lay down the principles that apply and should govern with respect to this question on a second trial. Favoring the majority view, see *Shepherd v. Union Mut. Ins. Co.*, 38 N. H. 232; and against it, at least partially, see *Western Mass. Ins. Co. v. Riker*, 10 Mich. 279. The cases cited by the appellants of a transfer from one tenant in common to the other, or from one partner to his copartner, of his whole interest in the property insured, do not touch the above question. We attach no importance to the fact that Hussey (the local agent of the defendants, and the clerk of Allen), knew of the assignment from the plaintiff to Allen, and did not object thereto. He was not asked to consent to that assignment. It is not shown that he had power to waive the express condition of the policy as to the effects of such a transfer. So far as the instructions of the court assumed or stated that if Hussey knew of this assignment as agent of the defendant, and did not object thereto, this knowledge and failure to object would prevent the transfer from avoiding the policy, they were erroneous: See change of defendant's instruction, Nos. 8, 8, 10, 23, and others; *Keenan v. Dubuque Mut. Fire Ins. Co.*, 13 Iowa, 375; *Forbes v. Agawam Mut. Fire Ins. Co.*, 9 Cush. 470, 473.

3. We must dispose of the less important questions briefly. Hall sued John Ayres (the present plaintiff) on the title bond in question, alleging the assignment of January 10, 1860, and the condition that he, John Ayres, should pay the same, etc. Ayres filed an unsworn answer, denying from beginning to end every averment in the petition of Hall, and, among other allegations, denied that the bond had been assigned to him, or that he had any interest therein. This answer was signed thus: "C. C. Cole, attorney for defendant, *per* Bartle." As an admission of the defendant in that suit, it was competent evidence against him in this suit: See authorities cited by appellant's council. The presumption is, that it was filed by his authority. This was not rebutted, and the court erred in rejecting it. The weight would be for the jury.

4. When plaintiff closed his evidence, defendant made a motion for a nonsuit, because of an alleged failure to make on some points the necessary proof. This motion was overruled, and the defendant then went on and introduced his evidence; and the plaintiff then adduced further evidence. The cause having afterwards been fully tried on its merits, we would not

reverse the judgment for any supposed or technical error in the ruling on the motion for a nonsuit.

5. As to the alleged misrepresentation as to the state of the title, or failure to disclose the true state of the title, a few observations may be required, in case the cause is again tried. Section third of the conditions of insurance provides that "property held in trust, or on commission, must be insured as such; otherwise the policy will not cover such property. By property held in trust is intended property held under a deed of trust, or under the appointment of a court, or property held as collateral security. If the interest in the property to be insured be a leasehold interest, or any other interest not absolute, it must be so represented to the company and expressed in writing, otherwise the insurance shall be void." It is claimed by the appellants that the title to this property was put into John Ayres, the plaintiff, by William F. Ayres & Co., to defraud their creditors, and that the plaintiff holds it, therefore, in secret trust for Ayres & Co. This is not such a holding in trust as is contemplated by the above condition. If the plaintiff held it as security for a debt, it would be otherwise.

Again, it is claimed that the plaintiff's interest not being absolute, and the contrary not being expressed in writing, the insurance is void. In the body of the policy the mill is described as the plaintiff's, the insurance being upon "his steam flouring mill and machinery." In the application for insurance, which is made by the policy part thereof, and a warranty, the following question occurred: "What encumbrance, if any, is there on said property? If mortgaged, state the amount. Is there any insurance by the mortgagee?" The applicant (W. F. Ayres) answered as follows: "Property in the name of John Ayres, subject to a payment of fifteen hundred dollars, purchase-money for ground where located, has been sold at sheriff's sale to satisfy a judgment creditor of William F. Ayres & Co. Insurance payable to him (B. F. Allen, the judgment creditor), first to amount of claim, balance payable to Ayres & Co." Evidence was offered, tending to show that Hussey, the local agent of defendant, filled up the application, which was afterwards signed by William F. Ayres for William F. Ayres & Co. Allen testified, against defendant's objection, that "Hussey was told by William F. Ayres, as near as witness could recollect, that William F. Ayres & Co. held a title bond for a deed from Edwin Hall,

and that the bond was assigned to John Ayres; that Mr. Hall still had the legal title, and the amount due on the bond was stated at the time."

The defendant, with reference to these matters, asked the following instruction: "If the jury find from the evidence that there was a material misrepresentation in regard to the value of the property insured, or in any other material respect, in the application for insurance made by William F. Ayres & Co., the policy issued upon such application was void for such misrepresentation." To which the court added: "But if the jury believe from the evidence, that the said Ayres & Co. represented the facts as they existed, and the agent of defendant did not so take them down, but changed them so that such statements are not correctly stated in the application, then such charge was wrongful in the defendant, and they cannot take advantage thereof." Amid the conflicting decisions on this and kindred points, as to the effect of the acts and knowledge of agents, we think the correct rule, as applied to this case, is this: If Hussey, the local agent, had authority only to receive and forward applications for risks of this kind, and did receive and forward this application for William F. Ayres & Co., parol evidence would not be receivable to show that the agent failed to take down the statements or changed them. When the application was signed to be forwarded, the applicant made it his own. If, on the other hand, the local agent had the power to pass upon, and did pass upon, the risk in question without submitting it to his principal, and failed correctly to take down the facts stated by the applicant, in ignorance of which the application was signed, there is nothing in the policy in suit, as there is nothing in reason and justice to prevent the defendant from being estopped, and he is estopped from objecting that he has been misled by the representations of the assured. This policy contains no stipulations, such as are contained in some policies: See *Chase v. Hamilton Ins. Co.*, 20 N. Y. 52; *Jenkins v. Quincy Mut. Ins. Co.*, 7 Gray, 370; *Jennings v. Chenango Ins. Co.*, 2 Denio, 75; *Loehner v. Home Mut. I. Co.*, 17 Mo. 247, that the insurer shall not be bound by the acts or knowledge of the agent, or by statements made to or by any agent. In support of the principles above laid down, see *Hough v. City Ins. Co.*, 29 Conn. 10 [76 Am. Dec. 581]; *Plumb v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 392 [72 Am. Dec. 526]; and *Moliere v. Pennsylvania Ins. Co.*, 5 Rawle, 342 [28 Am. Dec.

675], in each of which insurers were held estopped or bound by acts of agents with reference to applications: *Wilson v. Conway Ins. Co.*, 4 R. I. 141; *Chaffee v. Cattaraugus County Mut. Ins. Co.*, 18 N. Y. 376; *Brown v. Cattaraugus County Mut. Ins. Co.*, 18 Id. 385, where the insurer was not held bound, where the agent had power only to receive and forward applications. On the contrary, the Massachusetts cases make it the duty of the assured, in all cases, to see that the application is correct, the agent of the insurance company being, as respects the receiving and filling up of applications, the agent of the applicant: *Lowell v. Middlesex Mutual Fire Ins. Co.*, 8 Cush. 127, 133; *Vose v. Eagle Life and Health Ins. Co.*, 6 Id. 42; *Forbes v. Agawam Mut. Fire Ins. Co.*, 9 Id. 470; *Lee v. Howard Fire Ins. Co.*, 3 Gray, 583.

6. The contract of insurance in this case is made with the plaintiff, and not with Allen: *Lowell v. Middlesex Ins. Co.*, 8 Cush. 127. This is so, notwithstanding the provision in the policy that Allen is to be first paid to the extent of his claim. One of the conditions attached to and forming part of the policy, requires "all persons insured by the company to deliver a particular account of loss or damage, signed by their own hands," containing, etc. "And until such proofs, etc., are produced by the claimant, the loss shall not be payable." The preliminary proof of loss was made by Allen, who stated at the conclusion "that plaintiff was a non-resident of Iowa; was ignorant of the fire, and that he makes this proof both for John Ayres and himself." As to the claim of the plaintiff under the policy, it is plain that the company would ordinarily be entitled to have his oath as to the matters required by the policy to be set forth in the proofs of loss; but if the assured is non-resident, and has an agent in charge of his premises, on account of which the loss is claimed, we see no reason why the proof may not be made by him. Certainly, this would be sufficient if not objected to for that reason.

In this case, Allen did not pretend to any prior direct authority to make the proof for the plaintiff, and was not his agent. And the proof made by him would not be sufficient in favor of the plaintiff, unless it was waived by the insurers: *Mason v. Harvey*, 8 Ex. 819. Mere silence will not amount to a waiver of defective proofs of loss: *Keenan v. Du-buque Mut. Ins. Co.*, 13 Iowa, 375; but if the company or its authorized agents made no objections to the proofs, because not made by the plaintiff in person, but placed their refusal

to pay upon other specific and distinct grounds, the defendant cannot defeat the action, if the plaintiff is otherwise entitled to recover, by bringing forward at the trial objections not insisted upon at the time: *Taylor v. Merchants' Ins. Co.*, 9 How. 390; *Hartford Ins. Co. v. Harmer*, 2 Ohio St. 452; *Pearcock v. New York Ins. Co.*, 1 Bosw. 338; *Wyman v. People's Equity Ins. Co.*, 1 Allen, 301 [79 Am. Dec. 737]; *Peoria Marine Fire Ins. Co. v. Whitehill*, 25 Ill. 466; *Bodle v. Chenango County Mut. Ins. Co.*, 2 N. Y. 53. The third and fourth instructions to the jury, given by the court on its own motion, seem to accord with the above views, and were not erroneous.

For the error of the court, as pointed out in the latter part of the second division of the above opinion, with respect to the effect of Hussey's knowledge, and his failure to object to the transfer of the bond to Allen, and for the errors set forth in the third and fifth divisions of the foregoing opinion, the judgment below is reversed, and the cause remanded for a new trial.

Reversed.

COLE, J., having been of counsel, took no part in the consideration of this case.

HOLDER OF TITLE BOND HAS INSURABLE INTEREST IN REALTY: *Ayres v. Home Ins. Co.*, 21 Iowa, 188, citing the principal case.

EFFECT OF ALIENATION OR CHANGE IN TITLE TO AVOID INSURANCE POLICY: *Morrison v. Tennessee Ins. Co.*, 59 Am. Dec. 299, and note treating the subject at length; *Phoenix Ins. Co. v. Lawrence*, 81 Id. 562; *Barnes v. Union Mut. F. Ins. Co.*, 81 Id. 562, and notes. In *Insurance Co. v. Archer*, 36 Ohio St. 613, and *Savage v. Howard Ins. Co.*, 44 How. Pr. 53, citing the principal case, it is held that a change or transfer of title avoids the policy. A mere nominal change of interest is of no consequence; but where the change would increase the temptation to defraud the underwriters, it will avoid the policy: *Ayres v. Home Ins. Co.*, 21 Iowa, 190, 191, citing the principal case; and in *Commercial Ins. Co. v. Spankable*, 52 Ill. 60, where the principal case is also cited, it is held that a mortgage is not an alienation avoiding the policy. A distinction is made between mutual and other companies, and it is held as to the former class that insurance is personal, and that the policy does not pass, so as to continue the liability of the company to the assignee or purchaser of the insured property, unless by consent of the proper officer: *Sineral v. Dubuque M. F. I. Co.*, 18 Iowa, 323, citing the principal case; and see *Mutual Fire Ins. Co. v. Deale*, 79 Am. Dec. 673.

KNOWLEDGE OF AGENT BINDS INSURANCE COMPANY, WHEN: See *Hough v. City F. Ins. Co.*, 76 Am. Dec. 581, and note. As to whether agent is acting for assured or insurer, and liability in either case, see the extended note to *Clark v. Union Mut. F. Ins. Co.*, 77 Am. Dec. 724 et seq. The rules of law laid down in the principal case as to applications taken by agents, are followed in *Ayres v. Home Ins. Co.*, 21 Iowa, 192. If the agent has no further

authority than to receive and forward application for policy, the company is not bound by notice to him: *Dickinson v. Miss. Val. Ins. Co.*, 49 Iowa, 290; *Kingston v. Aetna Ins. Co.*, 42 Id. 47; but if on the other hand the agent has full power to the extent of passing upon risks, the company is estopped by his acts or by notice to him: *Anson v. Winesheik Ins. Co.*, 23 Iowa, 86; *Insurance Co. v. Wilkinson*, 13 Wall. 234; *Suns v. State Ins. Co.*, 47 Mo. 60; and see *Bartholomew v. Merchants' Ins. Co.*, 25 Iowa, 514, on both of these points, all citing the principal case.

WAIVER BY INSURER OF DEFECT IN NOTICE OF LAWS: See *Trask v. F. & M. Ins. Co.*, 72 Am. Dec. 622, and note. The rules laid down in the principal case as to proof of loss, and waiver of defects therein, are followed in *Ayres v. Home Ins. Co.*, 21 Iowa, 193.

ADMISSIONS BY ATTORNEYS, WHEN BINDING ON CLIENT: See note to *Clark v. Randall*, 76 Am. Dec. 256. In *Jones v. Clark*, 37 Iowa, 588, 589, citing the principal case, it is held that attorneys have power to make admissions for the purpose of dispensing with proof of certain facts on the trial of the cause.

THE PRINCIPAL CASE WAS AFFIRMED UPON ALL POINTS on a subsequent appeal: *Ayres v. Home Ins. Co.*, 21 Iowa, 193.

SEARS v. LIVERMORE.

[17 IOWA, 297.]

PURCHASER OF PROPERTY UNDER SALE IN PURSUANCE OF POWER is chargeable with notice of the extent of the power, and is bound to see that it has been pursued.

IN ASCERTAINING WHETHER POWER HAS BEEN PROPERLY EXERCISED OR FOLLOWED, no question of jurisdiction is involved as in cases of judicial sales.

DIRECTIONS IN POWER OF SALE MUST BE STRICTLY PURSUED, and a deviation in the execution of the power will invalidate the sale.

WHERE DEED CONTAINING POWER OF SALE provided that notice should be given by posting on the front door of a certain hotel, a posting of such notice near the door but not on it is not a sufficient compliance with the power; and the fact that the proprietor of the hotel refused to permit the posting of such notices on the door of his house would afford no excuse for disregarding the terms of the power.

SUIT in equity to set aside a sale under a trust deed, authorizing the trustee to sell after giving "twenty days notice by posting an advertisement on the front door of the Goodenow hotel." The remaining facts appear in the opinion.

Charles Rech, for the appellants.

Charles M. Dunbar, for the appellee.

By Court, **WRIGHT, C. J.** It is very obvious that the vital question in this case is, whether the power of sale conferred by the deed was so executed as to pass the title to the purchaser.

Pertinent to this inquiry, the following familiar rules of law may be stated: The appellant takes under the execution of a power, and of course under its authority, just as if the power, and the instrument executing it, had been incorporated in the same deed. Her title rests upon the act creating the power, and takes effect as if created by the original deed: *Marlborough v. Godolphin*, 2 Ves. Sr. 78; *Cook v. Duckenfield*, 2 Atk. 562; *Doolittle v. Lewis*, 7 Johns. Ch. 45 [11 Am. Dec. 389]. The authority to sell being derived from the power, it follows that the purchaser is bound to look for and to understand the extent of such power; or, as elsewhere expressed, "taking under the power, he is bound to see that its terms are complied with": *Ormsby v. Tarascon*, 3 Litt. 410. And of course, in this, as in all other contracts, the object and design of the parties should be kept strictly in view, in ascertaining the nature and extent of the power.

The authority and its exercise are matters of contract. In ascertaining whether the authority has been properly exercised or followed, it is not a question of jurisdiction, as in judicial sales, for it is not from the courts, but from the contract or agreement of the parties, that the power is derived. Hence the cases of *Morrow v. Weed*, 4 Iowa, 78 [66 Am. Dec. 122], and others discussing the same question, cited by appellant's counsel, have no application.

In *Powell v. Tuttle*, 3 N. Y. 401, Harris, J., in speaking of an analogous question, says: "It is a familiar rule of law that a special authority must be strictly pursued. When such authority is prescribed by statute, and when in its exercise it operates to divest the citizen of his property, courts cannot be too sedulous in confining it within the boundaries which the legislature have thought fit to prescribe. At this day, and in this country especially, the protection of private rights demands this safeguard; and he who will review the adjudications of our courts, involving this principle, will be interested to observe with what uniformity and increasing jealousy the exercise of such a power has been restricted to its own specified limits." And in the same spirit, it is said in *Sharp v. Johnson*, 4 Hill, 99 [40 Am. Dec. 259], that "when lands are to be taken under a statute authority, in derogation of the common law, every requisite of the state, having the semblance of benefit to the owner, must be strictly complied with." And the rule is even more strict when the authority is found wholly in the contract of the parties. Says a late writer upon

this subject, reviewing and summing up the authorities: "The principle is undisputed and fundamental that directions in powers of sale must be strictly, literally, and precisely pursued, and admit of no equivalent or substitution, however unessential they might otherwise have been": 2 Am. Law Reg., N. S., 714. If the manner of its execution is particularly prescribed in the deed, this must be followed. The designation of a specific mode negatives the right to follow any other. Mr. Justice Washington, in speaking of the duty of the trustee to conform, in making the sale, to the terms of the power under which he proposed to act, says: "This was the test of value which the grantor thought proper to require, and it was not competent for the trustee to establish any other, although by doing so he might, in reality, promote the interest of those for whom he acted": *Greenleaf v. Queen*, 1 Pet. 144; and see 4 Kent's Com. 148, 190; *Dutton v. Cotton*, 10 Iowa, 408; *Burnet v. Denniston*, 5 Johns. Ch. 35; *Wallis v. Thornton*, 2 Brock. 422.

But without further recurring to principles, we come to the facts of the case before us. The deed required that notice should be given by posting the same "on the front door of the hotel." It is quite conclusively shown that it was not thus posted. Exactly where it was placed does not very clearly appear from the testimony. It was either on the large or small board referred to by one witness; on a board within the portico, and within a few feet of the door, as stated in the answer of Schrader; on the casings of the door, or on a board standing against the side of the building, according to the recollection of other witnesses. Whether the notice was ever seen by plaintiff does not appear, nor is it material. For notice to the world, in the manner prescribed in the deed, is as important to the grantor, and as much the object of requiring notice at all, as notice to him. Now, can it be said that the trustee strictly and precisely followed the directions of his power? If putting a notice upon a board standing against the side of the building is a notice upon the door, then he did; otherwise not. The weight of the testimony shows that the notice was thus given, and we so find. That witnesses differ (no two of them agree) as to where the notice was placed, ought, of itself, to lead a court to hesitate long before divesting a citizen of his property, upon a proceeding harsh and severe in its nature, and therefore required to be carried on in strict conformity to the deed. The fact being found as above, however, all fair

cause for hesitation is removed, and plaintiff's equity is apparent.

For if posting in one place is the same as posting in another, or if the doing of one thing is the same as something else (where a strict and not a substantial compliance is demanded), the plaintiff is without remedy; otherwise not. That notice of the sale was thus more generally known, and more persons called to the sale, than if given according to the terms of the deed, can make no difference. The parties agreed upon one notice, at one place, and for twenty days. Suppose the trustee posted a thousand notices in as many different places in the county, for three months, and had publication made for the same time in the two newspapers of the town of Maquoketa, but failed to place an advertisement at the place required by the deed, would this be a compliance with the power? Could it be said there was no prejudice? that all this tended to and probably did promote the grantor's or debtor's interest, and therefore the sale should be upheld? If so, then the contract amounts to nothing. If so, then a party can just as well be brought into court by having the sheriff and all the constables in the county, and a hundred of his neighbors, tell him that an action is pending; can just as well be concluded by such notice as by that required by the statute. Such notice might give him vastly more information than an ordinary "summons," or the "notice of the statute"; but the cardinal trouble is, that it is not what the law requires; and there can be nothing equivalent to this; the law allows no substitute. To the parties under such an instrument as this, the contract furnishes the law. Without the notice which they have agreed upon, there is no power to sell; there is no jurisdiction.

That the proprietor of the hotel would not permit such notices to be posted on the door, cannot affect the question. The creditor was not without remedy. The courts were open to him to foreclose his trust deed as an ordinary mortgage. *Dutton v. Cotton*, 10 Iowa, 408, is in all forms with this as to this question. There, the law required that one of the notices of a mortgage foreclosure (by the strict method, as it is termed) should be posted at the place where the last term of the district court for the county was held. At the time of the sale, no term had been held in the county where the sale took place, and of course the sheriff could not comply with the law. Three notices were put up, however, one of them being at the office of the district court clerk. The sale was set aside, and

the party turned over to his remedy of foreclosure. Let the present creditor pursue the same course, if the debt is not paid and the trustee cannot give notice required by the deed.

Affirmed.

DIRECTIONS IN POWERS MUST BE STRICTLY, LITERALLY, AND PRECISELY FOLLOWED: See *Campbell v. Tagge*, 30 Iowa, 307; for if fraudulently, unfairly, and irregularly exercised, the owner, as to property sold thereunder, will be allowed to come in and impugn the sale, and redeem the property: *Penny v. Cook*, 19 Id. 544; and see *Pursley v. Hayes*, 22 Id. 21, all citing the principal case.

NOTICE OF SALE, SUFFICIENCY WHEN REQUIRED: See the note to *Hofman v. Anthony*, 75 Am. Dec. 704 et seq., and particularly page 712.

POLK COUNTY v. SYPHER.

[17 Iowa, 322.]

CONTESTS CONCERNING SURPLUS ARISING FROM SALES ON EXECUTION may be determined upon motion instead of by petition in equity or another action, especially where the facts are undisputed, or are susceptible of being clearly and easily ascertained.

WHEN SURPLUS ARISING FROM SALE ON EXECUTION has been actually paid over by the sheriff to subsequent execution creditors of the same debtor, such creditors should be brought before the court, in order to determine a contest in regard to such surplus.

APPLICATION OF SHERIFF'S PROCEEDS OF SHERIFF'S SALE. — Where a decree in foreclosure ordered a sale of so much of the mortgaged premises as should be necessary to satisfy the mortgage debt, and a special execution commanded the sheriff to expose the whole property for sale, under which it was divided into five parcels which were sold separately, the fifth one being sold after a sum had been realized from the sale of the other four sufficient to satisfy the debt, a motion in court by a subsequent lien-holder to apply the surplus thus arising operated as an affirmation or ratification of the sale, and on the hearing of the motion the sale would be treated as valid.

SURPLUS MONIES ARISING FROM FORECLOSURE SALE, while remaining in the hands of the sheriff, or under control of the court, belong to subsequent lien-holders in the order of priority, and should be so disposed of by the court; but when the execution does not direct the disposition of such surplus, and the sheriff, acting in good faith and without knowledge of such subsequent liens, applies the money upon other executions in his hands against the mortgagor, he will not be liable to such lien-holders therefor.

APPLICATION by one John Sherman, claiming to have a judgment lien on the premises of R. W. Sypher, subsequent to a mortgage thereon, to apply the surplus proceeds from the sheriff's sale on foreclosure of the mortgage, to his debt. The further facts appear in the opinion.

Withrow and Smith, for the appellant.

Casady and Polk, for the appellee.

By Court, DILLON, J. There is no objection to the practice of determining contests in relation to the surplus arising from sales on execution on motion, instead of by petition in equity or other action, especially where the facts are undisputed, or are susceptible of being clearly and easily ascertained, and no new parties are necessary. This practice is well established: *Williams v. Rogers*, 5 Johns. 163; *Ball v. Ryers*, 3 Caines, 84; *Every v. Edgerton*, 7 Wend. 259, 263; see also *Ritter v. Henshaw*, 7 Iowa, 97. But when it appeared in this case that the sheriff had actually paid over the surplusage moneys to the other execution creditors of the common debtor, these should have been before the court. If the sheriff was liable immediately and personally to the appellee, he could then have an order on those to whom he had paid the money to refund it to him, or for other relief, on showing himself thereto entitled. If it should appear that the sheriff was not liable, but that those to whom he had paid the money were liable to the appellee, they could be ordered to refund. But the parties receiving the surplus money in dispute not being before the court, we proceed to determine the only question before us, viz., whether the order of the district court, based on the motion before it, making the sheriff liable personally in respect of the overplus, was correct.

In support of the decision below, the appellee makes this point: The sheriff sold five lots (as subdivided), when four of them produced more than sufficient to pay the debt. Having done so, it is argued that he holds the surplus in trust for the party entitled to the first lien on the land, and that he paid it over at his peril. This is the point in this case that has given us the chief difficulty. The sheriff subdivided the mortgaged estate into five parcels; and four of them sold for enough to pay the decree under which they were sold. A doubt might possibly be suggested whether the sheriff, in selling all, exceeded the command of the writ which is his guide. The writ did not follow the decree, which was to sell the mortgaged estate, or so much thereof as should be necessary. In foreclosure proceedings, the court, because of the indivisibility of the premises, or because the parties consent, or for other causes, often orders the sale of the whole estate.

The execution, beyond which the sheriff need not go, com-

manded him "to expose to sale the following described property." In selling all, he obeyed the writ literally; although the law and the decree were both violated so far as the sale of the fifth parcel was concerned. We need express no opinion whether, under the writ, the act of the sheriff in making sale of the last parcel was wrongful, because in this case the rights of the parties do not turn upon the decision of this question: See *Trieber v. Shefer*, 18 Iowa, 29; *Waldo v. Williams*, 2 Scam. 470. This is not an application to set aside the sale; to disaffirm and repudiate the act of the sheriff in selling too much. There is no evidence that Sypher, whose property was thus sold, makes any objection to the sale. It may admit of serious question if Sypher ratifies and is satisfied with the sale, because it is an advantageous one, or for other reasons, whether it can be impeached and set aside by a judgment creditor. But waiving this question also, it is clear that when such a creditor comes into court and files a motion, making no complaint about the sale, but simply asking for the surplus, he, by that very proceeding, necessarily affirms and ratifies the act by which, and by which alone, the surplus was brought into existence: *Bacon v. Leonard*, 4 Pick. 277, 280. On this motion, which is the only proceeding before us, the question is just the same as if the surplus had arisen under a sale of the most unquestioned regularity. If Sherman wishes to try the question whether the act of the sheriff in selling the fifth parcel was, as to him, unauthorized and wrongful, or if he wishes to set aside the sale thereof and to test his right to do so, the law affords him appropriate remedies. The present motion was not framed with that view, and claims the money in question on other grounds. It assumes that the money is rightfully in the sheriff's hands, and asks it for the appellee, because he is the next lien-holder in order after the decree.

If the surplus money were still in the hands of the officer, or if it was in court, it would clearly belong to the appellee, who was the first lien creditor. By the statute, Revision, sec. 3666, "if there are no other liens upon the property, the overplus shall be paid to the mortgagor."

If there are other liens, "they shall be paid off in their order": Revision, sec. 3667. And the doctrine is well established, that when lands are sold on execution, the liens are transferred to and follow the surplus, at least in equity, and the surplus will be distributed in the order of the liens (whether

by judgment or mortgage) on the land out of which it arose: *Averill v. Loucks*, 6 Barb. 470; *Eddy v. Smith*, 13 Wend. 488; *Bodine v. Moore*, 18 N. Y. 347; *Barilett v. Gale*, 4 Paige, 503; *De La Vergne v. Evertson*, 1 Id. 181, 558, 635 [19 Am. Dec. 411]; *Doniphan v. Paxton*, 19 Mo. 288; *White v. Watkin*, 23 Id. 429; *Kennedy v. Hammond*, 16 Id. 341; 2 Am. Law Reg., N. S., 733, 734, and authorities cited; *Every v. Edgerton*, 7 Wend. 259. This principle is recognized in *Chase v. Parker*, 14 Iowa, 207; *Cook v. Dillon*, 9 Id. 407. It is not in the power of the debtor to assign this surplus so as to defeat liens on the land existing at the time of the assignment: *Doniphan v. Paxton*, 19 Mo. 288; *Van Nest v. Yeomans*, 1 Wend. 87; *Palmer v. Yarbrough*, 1 Ired. Eq. 310.

If the surplus is levied upon and appropriated by a junior lien-holder, this is an assignment from the debtor by operation of law; and this cannot be done to the destruction or prejudice of prior liens, any more than if the assignment had been direct from the debtor by contract or deed: *Eddy v. Smith*, 13 Wend. 488, 490, and cases *supra*. While the court would, as above observed, have awarded the surplus to the appellee, if the sheriff had returned the money into court, or if it were still in his hands, it does not follow that the sheriff is liable, under the circumstances, for having applied it on the other writs. The execution under which he acted did not require him to bring the surplus into court. It did not advise or notify him that the appellee or that any other person had liens upon the property or was interested in the surplus. Nor had he actual knowledge of such liens. He was therefore justified in presuming that the surplus was the property of Sypher: Revision, sec. 3315. Under these circumstances, he might have paid this surplus to Sypher without incurring liability, had no other executions been placed in his hand. When these came into his hands, it was his duty (having no notice of other liens) to levy them upon the overplus as Sypher's property, and having done so in good faith, and actually paid over the money, it seems to us manifestly unjust to subject him to liability to a party who had failed in the foreclosure proceeding to set up his rights, and respecting which the sheriff was faultlessly ignorant. It was stated, *arguendo*, in *Cook v. Dillon*, 9 Iowa, 407 [74 Am. Dec. 354], that a trustee making sale of land under a deed of trust is not bound to take notice of or search for subsequent judgments or liens, and that if such lien-holders do not notify him of their rights, he will be without fault and without lia-

bility if he pays the surplus over to the party whose land was sold. This is reasonable, and the principle is equally applicable to sales by a sheriff. His writ is his charter and his guide. He is not bound to examine the records of the county or those of the court to ascertain the rights of subsequent grantees or encumbrancers: *Bacon v. Leonard*, 4 Pick. 281. "Whilst the avails of a sale remain in the hands of a sheriff, they are subject to the control of the court": *Per Woodworth, J.*, in *Van Nest v. Yeomans*, 1 Wend. 87; and see also *People v. Ulster Common Pleas*, 18 Id. 628, 630; *Bartlett v. Gale*, 4 Paige, 503; but the sheriff will be protected where he acts in good faith, and without actual knowledge of the rights of others, when he is under no obligation to ascertain those rights: *Bacon v. Leonard*, 4 Pick. 277, 281, which fully supports the views above expressed; and see also *Williams v. Rogers*, 5 Johns. 163, 167; *Turner v. Fendall*, 1 Cranch, 117. As to the right of the appellee to have the sale of the fifth parcel set aside, or to hold the sheriff in damages, we give no opinion. Whatever rights the appellee has, as respects the surplus, he must assert against those who received the money. The order appealed from is therefore reversed.

APPLICATION OF SURPLUS ON SALE TO SATISFY JUDGMENT: See *Cook v. Dillon*, 74 Am. Dec. 354. All the parties interested may be brought before the court and their respective rights adjusted: *Hawley v. Hunt*, 27 Iowa, 303, citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Osborn v. Cloud*, 21 Iowa, 239, to the point that before a sheriff's sale is set aside the purchaser should have notice of the motion: *Osborn v. Cloud*, *supra*; in *Trieber v. Shafer*, 18 Id. 35, to the point that an officer in selling should follow his process; and in *Skiff v. Cross*, 21 Id. 461, to the point that if the property of a third person was applied to the satisfaction of a judgment, and subsequently recovered from the judgment creditor, he might have his judgment revived.

ISETT AND BREWSTER v. LUCAS.

[17 Iowa, 508.]

PROCEEDS ARISING FROM FORECLOSURE SALE UNDER MORTGAGE executed to secure several notes maturing at different times, should, in absence of any other binding agreement, be applied to the payment of the notes in the order in which they fall due, whether in the hands of an original payee or an assignee, and without reference to the order or time of their assignment.

PAROL EVIDENCE IS NOT ADMISSIBLE TO ALTER OR VARY LEGAL EFFECT OF MORTGAGE.

JUDGMENT IS ASSIGNABLE CHOSE IN ACTION, which the assignee takes subject to and charged with all the equities which could be asserted against it in the hands of the assignor.

EQUITIES BETWEEN TWO PARTIES TO JUDGMENT arising from other and independent transactions are not available against such instruments in the hands of an assignee, nor are equities asserted by persons not parties to the judgment or their assignees: *Per* Cole and Lowe, JJ.; Wright, C. J., and Dillon, J., expressing no opinion.

PROCEEDING to foreclose mortgage. Hall purchased of Patterson certain land, giving his two notes payable in one and two years respectively, and giving mortgages to secure each, the mortgages being executed by himself and wife. Patterson assigned one of the notes in blank to Tufts as collateral security for future advances, and on Tufts subsequently advancing money it was agreed that he should hold the note absolutely. Patterson subsequently obtained judgment of foreclosure against Hall and wife on the note first due, no other persons being parties to the proceeding. He then assigned the judgment to defendant Lucas. Tufts had sold the note last due to Issett and Brewster, who brought this suit to foreclose against Hall and wife, and Lucas, claiming that the agreement between Hall and Patterson was that the two mortgages were to be equal liens, and that neither was to have priority over the other. During the pendency of this proceeding Lucas filed a cross-petition to which Tufts filed an answer, and Tufts having died, such answer was used in evidence on the trial. The substance of the answer is stated in the opinion. The remaining facts appear in the opinion.

Richman and Brother, for the appellants.

Henry O'Conner and D. C. Cloud, for the appellee.

By Court, COLE, J. 1. Independent of any legal and binding agreement, where a mortgage is executed to secure two or more notes maturing at different times, the proceeds arising from a foreclosure of the mortgaged premises should be applied to the payment of the notes in the order in which they fall due. The different installments in a mortgage securing such notes are regarded as so many successive mortgages, each having priority according to the time of its maturity; and where, instead of one mortgage being executed to secure several notes given for the same indebtedness, a separate mortgage is given to secure each note, the rights of the parties are identical: *Bank of United States v. Covert*, 13 Ohio, 240; *State Bank v. Tweedy*, 8 Blackf. 447 [46 Am. Dec. 486]; *Grapengether v.*

Fejervary, 9 Iowa, 163 [74 Am. Dec. 336]; *Rankin v. Major*, 9 Id. 297; *Sangster v. Love*, 11 Id. 580; *Hinds v. Mooers*, 11 Id. 211; *Reeder v. Carey*, 13 Id. 274; *Massie v. Sharpe*, 13 Id. 542. Whether the notes thus secured are retained by the payee and mortgagee, or are assigned to different parties, the right of priority of payment still attaches to them; nor does the time of or order in which they are assigned, affect such right of priority.

2. The legal effect, then, of executing two mortgages to secure installments of the same debt, being to give priority as to the proceeds of the mortgaged property to the installments first due, such legal effect cannot be altered or varied by parol testimony, any more than the language of the written instrument itself: *Creery v. Holly*, 14 Wend. 30; *Barber v. Brace*, 3 Conn. 9 [8 Am. Dec. 149]; *La Farge v. Rickert*, 5 Wend. 187 [21 Am. Dec. 209]; *Thompson v. Ketcham*, 8 Johns. 189 [5 Am. Dec. 332]. The parol testimony of Hall, therefore, as to the agreement between him and Patterson in relation to the two mortgages being equal liens, neither to have priority over the other, which is contrary to the legal effect of the mortgages themselves, is incompetent, and cannot be considered for the purpose of altering or varying such legal effect and priority.

3. The rule that a judgment is an assignable chose in action, which an assignee takes subject to and charged with all the equities which could be asserted against it in the hands of the assignors, was recognized, approved, and applied by this court in the case of *Burtis v. Cook*, 16 Iowa, 194; and is therefore the law in this state. The question then is, whether this case comes within the rule, and if it does, whether the facts, as proved, establish any equity in favor of plaintiffs as against the assignor.

The rule as applied in the case of *Burtis v. Cook*, 16 Iowa, 194, was between one party to the judgment and the assignee of the other party to it; and such has been the relation of the parties in every case to which our attention has been called or given. The application of the rule in such cases is certainly very equitable, and without difficulty. But in this case the asserted equity is claimed, not by a party to the judgment, nor by a person claiming under or in privity with a party thereto, but by a stranger to such judgment, who claims adversely to both parties. Does the rule stated apply to such a case? It seems to the writer of this opinion, and Lowe, J., while Wright,

C. J., and Dillon, J., express no opinion thereon, that it does not, but that another rule applies, which is applicable to other unnegotiable but assignable instruments or evidences of indebtedness, to wit, the rule that equities between the parties to such instruments or evidences of indebtedness, arising from other and independent transactions, are not available against such instruments, etc., in the hands of the assignee. Neither the plaintiffs, Isett and Brewster, nor their assignor, Tufts, were parties to the judgment, and they were not therefore bound or concluded by it. The assignment of the judgment itself passed nothing as against them, only so far as such assignment carried with it the right to the claim upon which such judgment was rendered; and as to them, therefore, was only an assignment of such claim. Now, if the claim had been assigned before judgment, there is no question but the rule last stated would apply. But we have just seen that the judgment rendered upon the claim was not a judgment as to them; for they were not parties to it, and hence not bound or concluded by it. And if they were not bound by it so as that their interests could be prejudiced through it, ought they to be permitted to avail themselves of it to prejudice the interests of others? We think not; for in such case, there would be no mutuality. And further, the equities which, under the general rule as stated, attach to the judgment in the hands of the assignee, are those equities which have grown up against the judgment itself, as such, and not those which might, while in the hands of the assignor, have been made available against the claim upon which the judgment was founded.

4. But even if the rule contended for by the plaintiffs was applicable to their case, it is very questionable whether the facts proved by them would bring their case within the rule. It appears from the answer of Tufts, which was admitted as evidence, that at the time he took the note and mortgage as collateral security, and when they were finally set over to him, Patterson represented that he would surely redeem it, but if he did not, it was secured by 310 acres of valuable land which Tufts would get on foreclosure. Tufts did not know that there was another mortgage, nor did Patterson represent that there was not another. There was certainly no agreement that plaintiffs' mortgage should have priority over the other, for the other was not mentioned. The other mortgage was upon record, and was notice to Tufts of its existence; and doubtless, Patterson supposed Tufts knew of it; and supposing such fact, every

direct statement set out in Tufts's answer, as made by Patterson, is readily understood, and is consistent with truth. It may be doubtful, at least, whether the representations made to the witness Colonel Abbott, were made in the presence, or ever came to the knowledge of Tufts; and indeed, since Tufts himself does not state or claim that they ever did, it is reasonable to presume that they did not, and therefore they were not made the basis of the transaction, and hence not available in support of it. Again, it appears from the pleadings and evidence, that while Tufts took the assignment of the note and mortgage as collateral, before the assignment of the judgment, it also appears that the final purchase of it by Tufts was made after Patterson had sold the judgment to Lucas, and of course, when he could not prejudice the rights of Lucas by any representations or agreement he might have made. It also appears that some of these representations by Patterson (but which are not shown), were made to Tufts when the note and mortgage "were finally set over to him," and hence, after Lucas's rights had attached. It is not shown by plaintiffs when Tufts became liable for the two thousand five hundred dollars, part of the consideration for the final assignment of said note and mortgage, nor whether it was before or after the assignment of the judgment to Lucas; if it was after, it must have been advanced subject to his rights.

Nor is it made to appear when or for what consideration the plaintiffs, Isett and Brewster, obtained the assignment of the note to them; nor whether they had any knowledge, at the time they acquired it, of the alleged representations by Patterson to Tufts; nor whether they took the same relying upon such representations. Without further discussing the facts of the case, we think the plaintiffs have not clearly established their equity as against Lucas, even if the rule obtained which is contended for by them. The judgment of the district court is affirmed.

WHERE MORTGAGE IS GIVEN TO SECURE SEVERAL PROMISSORY NOTES, falling due at different times upon a foreclosure and sale of the mortgaged premises, the proceeds are to be applied to their payment in the order of their maturity: *Gropengether v. Fejervary*, 74 Am. Dec. 336, and note 341.

ASSIGNABILITY OF JUDGMENTS: See *Weire v. Davenport*, 77 Am. Dec. 132; *Charles v. Haskins*, 77 Id. 148, and cases in the notes. A judgment is an assignable chose in action, which the assignee takes subject to all the equities which could be asserted against it in the hands of the assignor: *Harshey v. Blackmarr*, 20 Iowa, 186; *Chapman v. Coats*, 28 Id. 292; *District Township v. White*, 42 Id. 614; *Independent School District v. Schreiner*, 46 Id. 176; but

only such equities are available against the judgment, in the hands of the assignee, as arise out of or are connected with it: *Thompson v. Hurley*, 19 Iowa, 335; and are asserted by parties to the judgment or their assignees: *Huret v. Sheets*, 21 Id. 506, all citing the principal case.

PAROL EVIDENCE TO VARY LEGAL EFFECT OF MORTGAGE: *Timms v. Shannon*, 81 Am. Dec. 632, and note. The principal case is cited in *Dunbar v. Stickler*, 45 Iowa, 386; and it is held that a deed cannot be varied by parol as to ingraft a condition not expressed in the deed.

FYFFE v. BEERS.

[18 IOWA, 4.]

ACTUAL REMOVAL FROM HOMESTEAD WITH NO INTENTION TO RETURN is a waiver or forfeiture of the right, amounting to an abandonment as against purchasers or creditors, even though no new homestead be gained.

TEMPORARY REMOVAL FROM HOMESTEAD DOES NOT AMOUNT TO ABANDONMENT thereof, and the homestead will be treated as still existing, if the *animus revertendi* is established, and third persons have not been led to believe that it was not a homestead by the owner being thus out of possession, and to act upon this belief by purchasing or specifically altering their condition upon the faith that it was not exempt as a homestead.

WHETHER REMOVAL FROM HOMESTEAD WAS ACTUAL SO AS TO CONSTITUTE ABANDONMENT, or merely temporary, depends upon the peculiar facts of each case, and no general rule for the determination of the question can be enunciated.

POSSESSION BY OWNER OF HOMESTEAD OF ADJOINING TRACT OF LAND under parol contract of purchase, and improvement thereof as part of the homestead, will operate to exempt such land from judicial sale to satisfy a debt contracted after such purchase but before actual conveyance to him.

PETITION for injunction. In 1856, one Crummey, plaintiff's father, purchased for her and her daughter, and caused to be conveyed to them, a two-acre tract of land in Iowa City. On the premises was a house not fully finished, but sufficiently so to allow of its being occupied in summer, and into it plaintiff with her husband and family moved, claiming it as a homestead. During the latter part of the year they removed to some distance to engage in business, but, plaintiff claims, not with the intention to abandon the homestead. While they resided on the premises, the residence was finished and out-buildings and fences erected, and after they left, plaintiff continued to improve the place. During the time they resided on the premises, plaintiff made a verbal contract for the purchase of about three acres of land adjoining the tract above mentioned, with a view of enlarging the homestead grounds,

but the contract was not reduced to writing, nor any money paid until May, 1857, when the sum of five hundred dollars was paid, and a bond for a deed given. Plaintiff then took possession, turning both tracts into one, fencing the whole and setting out trees. No deed was given, nor was any evidence of title on record until November 27, 1857, when the balance of the purchase price was paid. Prior to this date, but after her removal from the premises, plaintiff contracted to purchase of Beers and wife other land situated elsewhere, and gave her notes for the purchase price, receiving a title bond. Failing to pay these notes, judgment went against her; and this latter property was sold to satisfy the execution, but as it failed to do so, execution was issued and levied upon the parcels of land mentioned above, and claimed by plaintiff as a homestead, and the same was advertised for sale. Before the sale, plaintiff and her family removed back to the premises, and filed this petition to enjoin sale by the sheriff, on the ground that the property was exempt as a homestead, and had never been abandoned as such. The injunction was granted.

Edmonds and Ransom, for the appellant.

Fairall and Boal, and W. E. Miller, for the appellees.

By Court, DILLON, J. I. That the tract of two acres purchased by the plaintiff's father, and conveyed to the plaintiff and her daughter, became impressed with the homestead character by actual residence thereon in June, 1856, and that it remained so impressed until removal therefrom in October, 1856, is a clear proposition, and one which is not controverted by the creditor's attorney. The questions relating to the contiguous tract of about three acres, which the plaintiff annexed to the homestead, we will consider hereafter. And the question is, Was the homestead, thus acquired and perfected, lost or forfeited, so as to render the premises liable in November, 1861, to levy and sale on the execution of the defendant Beers?

It was not lost or terminated by the acquisition of a new homestead, for during the plaintiff's absence she lived on rented property, and acquired elsewhere no new home, no property to which the homestead exemption would attach. The attorneys of the creditor claim that it was forfeited by abandonment. The proposition is not disputed that the homestead right may be thus lost. It is difficult and dangerous, on

this subject, to lay down general rules which will apply to all cases. This may perhaps be safely asserted, that actual removal from the homestead, with no intention to return, will waive or forfeit the right as against purchasers or creditors, even though no new homestead may be gained.

The difficulty arises in cases where the removal is actual, but where there is claimed to exist the intention to return and resume possession of the premises as a home. And here the difficulty is chiefly one of fact, rather than of law. For if the removal is temporary, and the *animus revertendi* is established, and third persons have not been led to believe it was not a homestead, by the owner thus out of possession, and to act upon this belief by purchasing or specifically altering their condition upon the faith that it was not exempt as a homestead, the law would treat the homestead right as still subsisting.

For such cases no general rule can be enunciated; each turns upon, and the decision of each exacts a special regard to its own peculiar facts. How long an absence will forfeit the right depends upon circumstances. If a man, for example, should lock up his homestead, or even rent it, and go to Europe on a tour of pleasure, or for any other temporary purpose, clearly intending to return and resume possession of the homestead, it seems clear that even five years' absence would not, certainly as respects general creditors, work a forfeiture of the homestead right: *Walters v. People*, 18 Ill. 194 [65 Am. Dec. 730]; S. C., 21 Id. 178; *Guid v. Guid*, 14 Cal. 506 [76 Am. Dec. 441]. Prolonged absence would ordinarily justify the conclusion of abandonment; but this may be rebutted and explained, especially where third persons have not been actually misled: 1 Am. Law Reg., N. S., 712, and cases there cited. In the case at bar, the absence from the premises claimed as a homestead, was, from October, 1856, to December, 1861, over five years.

Has this been explained so as fully to overcome the presumption of abandonment, naturally arising from an absence so protracted? That is the question upon which the case wholly turns. It is a close one, but upon the whole evidence, and on all of the circumstances, we think the plaintiff entitled to relief. We proceed briefly to state the reasons which led us to this result. Unlike *Trawick v. Harris*, 8 Tex. 312, there was no voluntary removal to and domiciliation in another state. Unlike *Davis v. Andrews*, 30 Vt. 678, the creditor

here is not the *bona fide* grantee of one of the parties, parting with money or property in ignorance of the homestead right, and upon the strength and faith of a specific conveyance to him. On the contrary, upon the doctrine of *Jones v. Crosthwaite*, 17 Iowa, 393, *Patton v. Kinsman*, 17 Id. 428, and *Johnson Co. v. Rugg*, 18 Id. 137, it is, to say the least, very questionable whether the defendant, Beers, was entitled to a personal judgment and a general execution against the plaintiff. If not thus entitled, she cannot be said to have extended credit on the faith of being able to subject the plaintiff's separate property to liability to pay any portion of her debt, which might not be made out of the property on which she retained a specific security. And, in point of fact, we are satisfied that the defendant, Beers, relied, for her security, wholly upon the title which she retained, and not upon the plaintiff's other or general property. The following are, in outline, the reasons which lead us to the conclusion that the plaintiff did not intend to abandon her homestead in the premises in controversy, but on the contrary, intended to resume their possession as her home, and that of the family:

1. She actually acquired no other home. Her statement to the agent of the defendant at the time she bought the lot in Iowa city that "she regretted having sold it, and wished to repurchase it as a home," is by no means conclusive that such was really her intention, and is not inconsistent with the notion that this purchase was, as Mr. Fyffe testifies, made "upon speculation."

2. It is clearly shown by the testimony, that during her whole absence the plaintiff and her family always spoke of the property in controversy as their home, and of their intention to return to it, and this before as well as after the creation of the debt to the defendant, and when there would be no motive to misrepresent.

3. What is more important, the plaintiff's acts confirm and fortify the declarations of herself and of the family. Thus she left a considerable portion of her furniture in the house, and it remained there during the whole time the plaintiff was absent. So after the removal, a large number of trees and shrubbery were, from time to time (during every season, says one witness), set out with a view to beautify and improve the place for a home, and other kinds of work were done, "such as are usual in fixing up and making a home." Again, it was not rented to tenants, as houses generally are which are owned and kept

for rent or profit. Thus, Mr. Fairall occupied it one season as a "special favor," paying only taxes and insurance. Afterwards H. Harrington occupied it to take care of it, paying one third of the products of the garden. The rest of the time, before plaintiff resumed possession, it was occupied by Shafer and his family, while he was employed by the plaintiff as a hired hand at the hotel in Iowa City.

4. Advantageous offers to purchase or exchange it were refused by the plaintiff because it was her home.

When the absence is so prolonged as in this case, the court is of opinion that the intention to return to the premises as a home should be clear and unmistakable; but we believe this has been made to appear. These circumstances clearly distinguish this case from that of *Davis v. Kelly*, 14 Iowa, 523; and satisfy us that the plaintiff never did, in fact, relinquish the intention to resume the possession of the premises in dispute as her home. We would not give a construction to the statute that would sanction frauds upon creditors.

If the intention to abandon existed, we would not allow it to be resumed to the prejudice of intervening rights. But the law does not make the homestead a prison in such a sense that the owner cannot leave it for temporary purposes without a forfeiture of the exemption. In this case, the absence was designed to be temporary for the purpose of supporting the family, and to acquire means to improve the homestead and "make it comfortable." The design to return was never relinquished. Such an absence will not waive the right as to general judgment creditors, or creditors at large; and further than this we are not called upon to decide. Fully supporting these views, and the conclusions reached, see *Shepherd v. Cassidy*, 20 Tex. 24 [70 Am. Dec. 372], and remarks of Hemphill, C. J.; *Gouhenant v. Cockrell*, 20 Id. 96; *Taylor v. Boulware*, 17 Id. 74; *Walters v. People*, 18 Ill. 194 [65 Am. Dec. 730]; S. C., 21 Id. 178; *Franklin v. Coffee*, 18 Tex. 413, 417 [70 Am. Dec. 292]. And as to the rights of judgment creditors, *Welton v. Tizzard*, 15 Iowa, 495, and *Vannice v. Bergen*, 16 Id. 555 [*ante*, p. 531].

II. Under the circumstances of the case (see statement), we think three acres are likewise exempt as part and portion of the homestead. This adjoined the other, and was purchased for the purpose of making it part of the homestead. This purchase was made by verbal contract during the time the plaintiff was in actual possession of the two acres; and it was

completed and possession actually taken, and improvements made thereon before the debt to the defendant was created. Being thus annexed and improved prior to the time the plaintiff's debt was in existence, and the defendant not having (as we have seen), been misled into parting with money or property upon the faith and belief that this property was or would be liable to her, we are of opinion that it should justly be considered and treated, as respects the defendant, as an integrant part of the homestead premises, and equally with the other tract exempt from sale under the execution. Under our statute, the homestead may consist of different tracts if contiguous, or if they are habitually and in good faith used as part of the homestead: Revision, sec. 2283.

Affirmed.

ABANDONMENT OF HOMESTEAD: See note to *Taylor v. Hargens*, 60 Am. Dec. 600, where the subject is discussed at length; and see *Guidé v. Guidé*, 76 Id. 440, and cases in note. The principal case is cited in *Stewart v. Brand*, 23 Iowa, 482, as an authority on this subject. The abandonment to be effective must be permanent, and not merely temporary: *Orman v. Orman*, 26 Id. 362; and the length of time the claimant is absent from the property is to be considered in determining whether it amounted to an abandonment: *Dunton v. Woodbury*, 24 Id. 76.

DOYLE v. REILLY.

[18 IOWA, 182.]

REPORT OF REFEREE SHOULD BE SET ASIDE FOR UNCERTAINTY, IF, where the statute of limitations is pleaded as a defense, it is impossible to ascertain from the report when the limitation commenced to run.

IT IS AS MUCH DUTY OF DEFENDANT TO PLEAD PAYMENT as to set up any other defense which he may have, and if, in an action on a bond and mortgage, he fails to do so, and judgment is rendered against him for too large a sum, he cannot, unless excused by some equitable circumstance, such as fraud, accident, mistake, or surprise, make that recovery the ground of another action, but will be bound thereby.

PARTY FAILING TO DEFEND AT LAW, WHEN OPPORTUNITY IS GIVEN HIM, will be concluded both at law and in equity, unless he can make a satisfactory showing why he did not interpose his defense.

IF PLAINTIFF IN FORECLOSURE PROCEEDING FAILS TO CREDIT PAYMENTS made on the mortgage debt and takes a decree for the entire amount, but afterwards promises the defendant to refund the amount of such payments, the defendant may maintain an action on such promise, though he failed to plead such payments in the foreclosure proceeding.

REB ADJUDICATA. — Where there is a specific agreement to credit payments on a note, and the debtor has reason to believe, or no reason to doubt, that this has been done, and for that reason fails to defend, and an unjust amount is recovered against him, he cannot justly be held to have

been negligent in not appearing and defending, and may be relieved, if the judgment has not been paid, to the extent of the payment which should have been credited; or, it seems, if the judgment has been compulsorily paid, he may maintain *assumpsit* for such sum.

ACTION on an account for work and labor, and for money paid and money refunded to the defendant. Defendant answered and pleaded in set-off another account. Plaintiff by way of replication alleged that he had borrowed money of defendant, giving his note and mortgage; that the money for which he sues was paid by him to defendant on agreement that it should be credited upon the note and mortgage, and that by fraud defendant had induced the plaintiff to believe that he had done so; but that afterwards he had agreed to refund the amount so paid. The pleading makes no reference to the reason for refunding such sum, but the referee's report shows that a judgment had been recovered upon the mortgage and note, and that no credit had been given for the payments made by plaintiff, but a judgment of foreclosure and for the full amount of the note had been given, and had been collected by defendant. The referee found defendant indebted to plaintiff, whereupon the defendant moved to set aside the report on the ground that it was *res adjudicata*; that the petition stated no cause of action; that the claim was barred by the statute of limitations; and that the referee's report was uncertain in not passing on all the issues. The remaining facts appear in the opinion.

Shehan, for the appellant.

Hammond, for the appellee.

By Court, DILLON, J. By examining the issues made by the pleadings, in connection with the report made by the referee, it will readily be perceived that the action of the court in setting aside the report was not only eminently proper, but absolutely necessary. To the plaintiff's claim for money paid on the note and mortgage, the defendant pleaded the statute of limitations, which makes the lapse of five years after the cause of action accrued a bar: Revision, sec. 2740; except in cases of fraud: *Id.*, sec. 2741. The record shows that this action was brought February 20, 1863. The report of the referee finds that the payments sued for were made "at sundry times between the twenty-third day of August, 1857, and May, 1858." It is impossible to tell from this whether they were

made more than five years before this suit was brought, or within that period. This is the difficulty with the report, if the cause of action is to be considered as accruing from the date of payment. If the appellant insists that the defendant's conduct in not crediting the payment, and in taking a recovery for the full sum, amounts to a fraud, for which he is entitled to relief within the meaning of the sections above quoted (Revision, secs. 2740, 2741), and that the statute does not begin to run until "the discovery of the fraud," the answer is twofold: 1. He makes no such case by his pleadings; and 2. There is no finding as to the date when he first became aware of the fraud. Again, if the appellant claims that his cause of action did not arise until the defendant obtained the judgment on the bond and mortgage, and that he could sue at any time within five years from the rendition or payment of such judgment, the report is entirely silent as to when the foreclosure action was brought, or when judgment therein was rendered, or at what time, or under what circumstances, whether voluntarily or by compulsion, the defendant "collected the whole or the greater part thereof." A report so uncertain and defective as respects a material issue in the cause was most properly set aside.

As the cause will have to be retried, some observations in relation to the nature of the action are called for. Where a debtor has made payments which are not credited, and he has afterwards been compelled to pay the whole amount by judicial proceedings, the question whether he can have redress, depends upon circumstances, some of which, without entering upon the subject at great length, we will proceed to state. We confine our observations to cases of payment strictly. (As to what is payment, see *Strong v. McConnell*, 10 Vt. 233.) 1. It is as much the duty of a party, when sued, to plead payment, as it is to plead any other defense which he may have; and if he fails to do so, unless excused by equitable circumstances, and judgment is rendered against him for too much, he cannot make that recovery the ground of a new action. This is the general rule, and it is bottomed on the maxim, *Interest reipublicæ ut sit finis litium*: *Loomis v. Pulver*, 9 Johns. 244; *White v. Ward*, 9 Id. 232; *Le Queen v. Gouverneur*, 1 Johns. Cas. 436; *Walker v. Ames*, 2 Cow. 428; *Faulkner v. Campbell*, Morris, 148, 150; *Marriott v. Hampton*, 7 Term Rep. 269; S. C., with English and American notes, 2 Smith's Lead. Cas. 237. 2. If the defendant, in the first action, was himself negligent,

this alone is sufficient to defeat his right of recovery or ground for relief: See, in addition to the cases above cited, *Kriechbaum v. Bridges*, 1 Iowa, 14; *Arnold v. Grimes*, 2 Id. 1, 7; *Houston v. Wolcott & Co.*, 7 Id. 178, and other cases in this state cited in Iowa Dig. 218; *Briggs v. Shaw*, 15 Vt. 78; *Dilly v. Barnard*, 8 Gill & J. 170; *Tapp v. Rankin*, 9 Leigh, 478. The plaintiff's case, says Marshall, C. J., *Marine Ins. Co. v. Hodgson*, 7 Cranch, 332. must be unmixed with any fault or negligence in himself. 3. He must have been prevented, by accident, surprise, mistake, or fraud of the opposite party from making his defense: See same authorities, and also *Emerson v. Udall*, 13 Vt. 477 [37 Am. Dec. 604], and the many cases cited in 2 U. S. Eq. Dig. 125, sec. 188; *Ware v. Horwood*, 14 Ves. 31; further illustrations, see *Turpen v. Thomas*, 2 Hen. & Mumf. 189 [3 Am. Dec. 615]; *Dudley v. Cole*, 1 Dev. & B. Eq. 429. 4. A party failing to defend at law when an opportunity is given him, is concluded both at law and in equity, unless he can make a case "externally clear": *Per* Lord Eldon in *Protheroe v. Forman*, 2 Swanst. 227, where relief was denied, the defendant not showing why he did not defend at law; so in *Haden v. Garden*, 7 Leigh, 157; see also *Caldwell v. Fifield*, 24 N. J. L. 150. 5. The report of the referee, in the case at bar, does not find whether the present plaintiff appeared and defended the foreclosure action or not. If he did then appear, he knew that the payments were not credited, and if he failed to claim them, all of the authorities agree that he would be barred of an action to recover them, his only remedy being a review of the first action: See, in addition to cases above, *Loring v. Mansfield*, 17 Mass. 394; *Smith v. Weeks*, 26 Barb. 463; *De Sylva v. Henry*, 3 Port. 132. 6. In the case at bar, the plaintiff alleges that the defendant afterwards promised to refund the money which the plaintiff paid on the note and mortgage, and which was not credited. The referee does not make any finding upon the subject. If such an express promise is shown, it is valid, and will support a recovery thereon: *Bentley v. Morse*, 14 Johns. 463; *Cameron v. Fowler*, 5 Hill, 306.

It will be observed, in examining the authorities, that the defendants in the first action have sought relief or redress for payments made and not credited in different modes, as 1. By bill in equity for relief against the judgment: *Story's Eq.*, sec. 879, citing *Gainsborough v. Gifford*, 2 P. Wms. 424 (1727); and see observations on this case in *Protheroe v. Forman*, 2 Swanst. 227, 233 (1818), *per* Lord Eldon; in *Smith v. Lowry*

1 Johns. Ch. 320, 324, *per* Chancellor Kent, who intimates that it is overruled by *Marriott v. Hampton*, 7 Term Rep. 269. S. C., 2 Smith's Lead. Cas. 237; see also 2 Lead. Cas. Eq., pt. 2, p. 102; *Bateman v. Wilcox*, 1 Schoales & L. 201, *per* Lord Redesdale; *Taylor v. Wood*, 2 Hayw. 382; *Beams v. Denham*, 2 Scam. 58; and see Revision, c. 141; also *Hunt v. Dupuy*, 11 B. Mon. 282, as to remedy provided by statute.

Or 2. By action for money had and received. *Marriott v. Hampton*, 7 Term Rep. 269, is the leading case, denying the right to maintain this action. Some cases in this country, though not professing to overrule or deny it, seem to me not to be reconcilable with it; such as *Fowler v. Shearer*, 7 Mass. 14; *Rowe v. Smith*, 16 Id. 306, as to which last case doubts are intimated in a note, and in *Fuller v. Little*, 7 N. H. 535; but it was expressly followed in the recent case of *Smith v. Weeks*, 26 Barb. 463 (1857); see also *Loring v. Mansfield*, 17 Mass. 394; 2 Smith's Lead. Cas. 342; *Fuller v. Little*, 7 N. H. 538; *King v. Hutchins*, 28 Id. 561.

Or 3. By an action for the breach of the agreement to credit, whereby the plaintiff seeks to recover as damages an amount equal to the unjust recovery against him: *Cobb v. v. Curtiss*, 8 Johns. 470; see also *Fuller v. Little*, 7 N. H. 535; *King v. Hutchins*, 28 Id. 561. Of course, if there is an express promise to repay or refund, that is the ground of recovery.

Under our system of pleading, the plaintiff sets out the facts entitling him to recover, and we recommend that he amend his pleadings. We have thrown out the above remarks as to the mode of redress, so that the plaintiff may, if he sees fit to amend, do so, understanding our views of the general questions likely to arise. It only remains to be observed that we are of the opinion that where there is an agreement, especially a specific agreement, to credit the amount paid on the note, and where the debtor has reason to believe or no reason to doubt that this has been done, and fails to defend upon the faith thereof, and in ignorance that an unjust amount is sought to be recovered against him, he cannot justly be said to be negligent in not appearing and employing counsel to guard against a dishonest act which he had no reason to anticipate; and in such a case he may be relieved against the judgment, if not paid to the extent of payments not credited, or if the judgment has been compulsorily collected, we are inclined to hold, though this is more doubtful, he may, in the case supposed, maintain *assumpsit* for the amount out of which he has been defrauded.

We do not say that there can be no relief or recovery under any circumstances. We only say that in our judgment, after a full examination of the subject, both upon principle and authority, these circumstances are sufficient.

Affirmed and remanded.

CONCLUSIVENESS OF JUDGMENTS, GENERALLY: See *Sidensparter v. Sidensparter*, 83 Am. Dec. 527; *Finerman v. Leonard*, 83 Id. 665, and notes. Equity will not relieve against a judgment at law, to which complainant failed to make a legal defense when he might have done so: See *Baxter v. Dear*, 76 Id. 89, and note. His failure, without excuse, to interpose offsets and like defenses operating to estop him from insisting upon them after judgment: *Sastry v. Sastry*, 39 Iowa, 679, citing the principal case.

CASES
IN THE
SUPREME COURT
OF
KANSAS.

SWARTS v. STEES.

[2 KANSAS, 286.]

JUDGMENT CREDITOR IS NOT PURCHASER NOR AFFECTED BY WANT OF NOTICE, and a misdescription of land of the judgment debtor, in a recorded mortgage executed prior to the judgment, would not confer on such creditor a lien prior to that of the mortgagee; and the latter would be entitled, as against the judgment creditor, to have the mortgage reformed and foreclosed.

ACTION to foreclose mortgage, setting forth a mistake in the description of the land, and asking a reformation of the mortgage. On their application, Bryan and Hardcastle were made defendants, whereupon they answered setting up that they had recovered judgment against the mortgagee, and had levied upon the land attempted to be mortgaged, subsequent to the execution of the mortgage. They claimed that by reason of such misdescription, the recorded mortgage was no notice, and that they therefore acquired a lien prior to any which would result from a reformation of the mortgage.

Elmore and Martin, for the plaintiffs in error.

Nathan P. Case, for the defendants in error.

By Court, CROZIER, C. J. The only question necessary to be decided in this case is as to the priority of the liens of the mortgage and judgment. It is insisted by the judgment creditors that because there was no mortgage describing the lands they seek to subject under their judgment upon the records of the county, nor had they any notice of such mortgage, nor was there in fact any such mortgage in existence, their judgment

became the first lien upon the lands from the date of its rendition; that they had no notice of the existence of any encumbrance upon the land when their judgment was rendered; that a correction of the description of the land in the mortgage by the court subsequently to that time, could not deprive them of their prior lien, because they had no notice of the mistake.

If the judgment creditors, without notice of the defect in the plaintiff's mortgage, had become the purchasers of the land, or had taken a mortgage thereon to secure their debt, there would not be much question but that their title in the one case and their lien in the other would not be prejudiced by a subsequent reformation of the plaintiff's mortgage. They would then be "purchasers for a valuable consideration without notice," within the meaning of section 18 of the act regulating conveyances: *Comp. Laws*, p. 355.

But that section does not extend the benefits of a want of notice to judgment lien-holders. They are not "purchasers." Their lien is upon the "lands and tenements of the debtor," and not upon lands and tenements not in fact belonging to him: *Code*, sec. 433.

In this case, the lands in question, for the purpose of securing the payment of the plaintiff's debt, were, in equity, the plaintiff's lands. The district court in their judgment so find; and as that court had the legal power so to find, we are bound to presume they had sufficient evidence upon which to make that finding; and it can make no difference to these judgment creditors how that finding was made, or that the facts upon which it was predicated came to their knowledge after the date of their judgment. They have nothing to do with the question of notice. The recording act does not apply to them. The only question they had anything to do with was, whether the land had been pledged to the plaintiff. If it had been so pledged in fact before the rendition of their judgment, it was wholly immaterial to the judgment creditors whether they had any notice whatever of the fact: *Gouverneur v. Tius*, 6 Paige, 347. The district court found they were so pledged, and we are not asked to disturb that finding.

Several cases from the reports of the supreme court of Ohio were cited by the counsel for the judgment creditors to establish the position, that because there was no mortgage upon the records whereby, upon its face, these lands were pledged to the plaintiffs, their judgment was a prior lien. We do not think any of those cases in point under the Ohio statute, as

construed by the supreme court of that state. No mortgage was of any validity whatever, except between the parties to it, unless recorded. As to third parties, including purchasers, encumbrance and judgment lien-holders, whether they had actual notice of its existence or not, unless recorded, it was wholly void. Our statute is different in this respect: A mortgage here is good against everybody who has notice of its existence, whether recorded or not recorded; hence the inapplicability of the Ohio authorities.

We think, therefore, that the lien of the mortgage is prior to that of the judgment, and that the district court erred in directing the judgment to be first satisfied out of the proceeds of the sale of the land. The judgment of that court is in this respect reversed at the costs of the defendants, Byran and Hardcastle, and in all other respects approved, and the cause will be remanded to that court, and the court directed to render judgment declaring the lien of the mortgage prior to the lien of the judgment, and ordering the amount found due the plaintiff to be first paid out of the proceeds of the sale of the land.

BAILEY and KINGMAN, JJ., concurred.

JUDGMENT LIEN IS SUBJECT TO ALL EQUITIES existing in favor of third persons as to the debtor's lands at the time the judgment was rendered: See *Blankenship v. Douglas*, 82 Am. Dec. 606, and note 612. In *Harrison v. Andrews*, 18 Kan. 542, citing the principal case, it is held that a judgment creditor is never considered as a *bona fide* purchaser, or even as a purchaser at all, in the sense that purchasers are not affected by equities of which they have no notice.

STILLE v. McDOWELL.

[3 KANSAS, 574.]

MISTAKES OF PARTIES IN SALES OF LAND AS TO LOCATION AND DESCRIPTION of the premises intended to be sold may be corrected on sufficient proof.

PROOF OF MISTAKE OF PARTIES IN SALES OF LAND AS TO LOCATION AND DESCRIPTION, to authorize correction thereof, must be clear and decisive, but it is error to instruct jury that in order to find the fact of such mistake they must be satisfied beyond a reasonable doubt.

AVERTMENT OF OFFER TO RESCIND CONTRACT FOR SALE OF LAND WOULD BE ESTABLISHED by proof that the opposite party had prevented or dispensed with a formal tender of a deed.

ACTION upon a promissory note. The opinion states the facts.

Hemmingray and Gambell, and S. S. Ludlum, for the plaintiffs in error.

Stinson and Havens, for the defendants in error.

By Court, BAILEY, J. In this action, which was brought in the court below to recover of the plaintiffs in error the amount of a promissory note given as part of the consideration for ten acres of land adjacent to the city of Leavenworth, the principal reliance on the part of the defense was an alleged mistake of the parties to the sale; the land actually conveyed being different from and of far less value than that shown to the plaintiffs in error before the purchase, and which they supposed they were purchasing.

The jury, under the instructions of the court, found, among other things: 1. That Stille was mistaken; 2. That John H. McDowell, the agent of the vendor, in making the sale to Stille, was mistaken; but that, 3. Andrew J. Isaacks, the vendor, was not mistaken.

The charge of the court to the jury on this part of the case was as follows:—

“The main question, or the one about which there is the most controversy, is the question of mistake, and in regard to this question, I say to you, that before you can find that there was a mistake on the part of either of the parties, you must be satisfied of that fact beyond a reasonable doubt.”

The counsel for defendants (now plaintiffs in error), excepted to this charge, and bring their petition in error to this court.

It is well settled that mistakes of the kind alleged by plaintiffs in error may be corrected on sufficient proof; hence, the only question that can arise upon this point is as to the sufficiency of the proof, and upon this point the authorities are well agreed, if not as to the precise language, yet as to the effect and substance of the rule. In the case of *Gillespie v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 559], Chancellor Kent, after a full and careful review of the previous decisions, concludes by saying:—

“The cases all concur in the strictness and difficulty of the proof, but still they all admit it to be competent, and the only question is, Does it satisfy the mind of the court?” *Gillespie v. Moon*, 2 Johns. Ch. 585 [7 Am. Dec. 559].

And in the subsequent case of *Lyman v. U. S. Insurance Co.*

2 Id. 632, the learned chancellor, says: "The cases which treat of this head of equity jurisdiction, require the mistake to be made out in the most clear and decided manner, and to the entire satisfaction of the court": See also the same case reported in 17 Johns. 373.

Such in effect and in language slightly varied, is the rule laid down in the most carefully considered cases under this head, and it is obvious that the rule as given to the jury by the court below is in terms different and considerably more stringent.

The language used in the charge of the court can only be strictly applicable to cases arising under the criminal code, and has as yet no judicial sanction as applied to civil practice.

As the conclusion we have arrived at upon this point will involve the necessity of a new trial, we deem it proper to advert briefly to one other ruling of the judge who tried this cause, touching the offer to rescind the contract.

The court charged "that in order to constitute an offer to rescind the contract the defendant must at the time have tendered a deed, but that if he simply verbally offered to deed back the lots without at the same time tendering such deed, it was not in law an offer to rescind."

We conceive the rule of law on this point to be, that the averment of an offer to rescind would be established by proof that the opposite party had prevented or dispensed with a formal tender of a deed.

New trial granted.

All the justices concurred.

MISTAKE IN DESCRIPTION OF LANDS IN DEED, and proof and correction thereof: See *Clark v. Munyon*, 33 Am. Dec. 752; *Okotom v. Jones*, 50 Id. 469; *Cumley v. Stanfield*, 60 Id. 219.

RESCINDING OF CONTRACTS: See the note to *Bryant v. Isenburgh*, 74 Am. Dec. 657 et seq.

HEFFERLIN v. SINSINDERFER.

[2 KANSAS, 401.]

LESS *LOCUS CONTRACTUS* AT TIME CONTRACT WAS MADE DETERMINES WHAT CONTRACT WAS, and the *lex fori* at the time the enforcement is sought prescribes the remedy. Thus, after execution and levy in an action in Kansas, on a note made in Missouri, a sale for less than two thirds of the appraised value of the property is void, if by the law of Kansas it is so provided, though by the law of Missouri it is not so provided.

ACTION on promissory note. The opinion states the facts.

R. W. Housely, for the plaintiff in error.

Lecompte, Mathias, and Burns, for the defendants in error.

By Court, CROZIER, C. J. On the fifth day of May, A. D. 1853, Hefferlin, the plaintiff in error, at Weston, in the state of Missouri, made his promissory note, payable to defendants in error in one day after date. On the first day of August, 1859, a suit was brought on this note in the district court of the then territory of Kansas, sitting in Leavenworth County, and a judgment was, on the 18th of December of the same year, rendered against Hefferlin. Upon this judgment, an execution was, on the 31st of July, 1860, issued to the sheriff of Leavenworth County, who levied upon a quarter-section of land as the property of Hefferlin, and having had the same appraised at \$1,500, sold it to defendant, Sinsinderfer, for \$416; which sale was, by an order of the court, at December term, 1860, confirmed, and the sheriff ordered to execute a deed for the lands to the purchaser. The plaintiff in error now seeks to have this order reversed for several reasons, among which is: that the land was sold for less than two thirds of its appraised value; or, in other words, was sold without appraisalment.

The position taken by the court below was, that inasmuch as the contract upon which the judgment was rendered had been executed before the passage in this state of any law requiring an appraisalment of real estate upon a sale under execution, the law, as announced by the supreme court of the United States, did not require or authorize an appraisalment; referring to the cases of *Bronson v. Kinzie*, 1 How. 311, and *McCracken v. Hayward*, 2 Id. 608.

The case at bar differs from those cases in a very important particular. In each of those cases, the contract had been made in the state of Illinois, the law, at the time of their

execution, not requiring an appraisalment; and upon an attempt to enforce them in that state, the supreme court of the United States held, that to require property sold to satisfy judgments rendered thereon, to bring two thirds of an appraised value, would operate to impair the obligation of the contracts.

That conclusion was arrived at upon the theory that the law in force at the time the contract was made became a part of it, and could not be changed to the prejudice of the party seeking to enforce it.

But in this case the contract was not made in Kansas. It was made before there was a state of Kansas, or even a territory of Kansas. It was made in Missouri. It could not be said that the law of Kansas became a part of the contract. There was no Kansas law to become a part of it; and if there had been any local law here, this contract, having been made in Missouri, could not be said to have been made with reference to it. The law of Missouri only became a part of it; and then only so far as to determine its construction when its enforcement was sought in another state. Each state may prescribe what property of its citizens may be subjected to sale under the process of its courts; and may prescribe and from time to time change the manner of the sale, subject only to the limitation that the obligation of a contract shall not thereby be impaired; and when a contract executed under another jurisdiction is brought here for enforcement, the law here, for the time being, governs the remedy. Any change in the law regulating the remedy here cannot affect the obligation of such a contract, because the law of the remedy here forms no part of the contract. Any change in the law of the former does not change any ingredient or stipulation of the contract. The *lex loci contractus* at the time the contract was made determines what the contract was; the *lex fori* at the time the enforcement is sought prescribes the remedy.

The plaintiffs in the court below were the beneficiaries of a contract executed in Missouri. The laws of that state furnish the rules of construction, and had a suit been brought on it there, the law of the remedy at the time of its execution, if it had been subsequently changed to their prejudice, might have been invoked to aid in its enforcement. But upon going to another jurisdiction in pursuit of their remedy, they cannot complain if the law of the remedy, at that place, is less efficient when this suit is brought than where the contract was made.

They contracted wholly without regard to that law, no part of it entered into the contract, and the obligation thereof is in no sense impaired by a change in that law.

The order of the district court confirming the sale and ordering a deed is vacated, and the court directed to set aside the sale that was made; leaving the plaintiff below to pursue his remedy as if no sale had been made.

All the justices concurred.

LEX LOCI CONTRACTUS GOVERNS AS TO CONSTRUCTION AND VALIDITY OF CONTRACT: See *Ayer v. Tilden*, 77 Am. Dec. 255, and note; while the *lex fori* governs as to the form of action or remedy: *Bucreti v. Harris*, 74 Id. 455, and note.

WISE v. STATE OF KANSAS.

[3 KANSAS, 419.]

ON TRIAL FOR MURDER, REJECTION OF EVIDENCE OFFERED BY DEFENDANT of the comparative strength of the deceased, is not error justifying reversal, where it is admitted by the prosecution in open court that the deceased was a much stronger man than the defendant.

ON TRIAL FOR MURDER, COMPARATIVE STRENGTH OF DECEASED AND DEFENDANT, is better proved by facts in detail, of what occurred at the time of the homicide, as the grapple, scuffle, and the like, than by the opinion of a witness.

ON TRIAL FOR MURDER, EVIDENCE OF CHARACTER AND HABITS OF DECEASED, as that he was well known by defendant and others to be quarrelsome and savage, is inadmissible, unless at least the circumstances of the case raise a doubt as to whether the defendant acted in self-defense, and then it may be sometimes admitted to show that the defendant was justified in believing himself in danger.

PERSON WAS NOT JUSTIFIED IN CONSIDERING HIMSELF IN DANGER so as to authorize him to kill his assailant, where it appears that the parties were eight or nine paces apart at the time of the fatal shooting, the former with a loaded double-barrel shot-gun, and deceased with a knife; and that deceased had stopped before defendant shot him.

IN CRIMINAL CASE, COURT PROPERLY REFUSED TO CHARGE JURY that "defendant is entitled to the benefit of every reasonable doubt upon every material fact involved in the case," and properly instructed the jury instead, that "the defendant is entitled to the benefit of every reasonable doubt of his guilt, remaining in the minds of the jury, after canvassing the whole of the testimony in the case."

INDICTMENT SUFFICIENTLY SHOWS THAT IT WAS FOUND BY GRAND JURY of Chase County, in which court was held, under a statute requiring the indictment to show that it was found by the grand jury of the county in which the court is held, where it reads: "State of Kansas, Chase County, ss.: In the district court of the fifth judicial district sitting in Chase County, April term, A. D. 1863. The jurors of the grand jury of the

state of Kansas duly drawn, impaneled, charged, and sworn to inquire of offenses committed within the body of the county of Chase, and within the county of Marion attached to said county of Chase, for judicial purposes," etc.

FELONIES ARE OFFENSES AGAINST STATE, and prosecuted and punished by and in the name of the state, by a grand jury organized in each county, pursuant to state laws to inquire in its behalf, as to infractions of its laws in each county.

WHERE IN INDICTMENT, ONE DESCRIPTION OF WOUNDS IS DEFECTIVE, but the indictment still contains a certain and explicit description of the wound that caused death, the defective description may be treated as surplusage or disregarded, under the Kansas statute.

INDICTMENT for murder. The opinion states the facts.

Elmore and Martin, for the appellant.

W. W. Guthrie, attorney-general, for the appellee.

By Court, **BAILEY, J.** At the spring term, A. D. 1863, of the district court for Chase County, the appellant, John S. Wise, was indicted for the murder of Robert Bailie on the fourth day of July, A. D. 1862, in the county of Marion, which is attached to Chase for judicial purposes. At the same term the case was transferred to the county of Lyon for trial.

At the October term, A. D. 1863, of the district court for the county of Lyon, Wise was tried, and convicted of murder in the second degree, and sentenced to ten years' confinement to hard labor.

The exceptions taken to the rulings of the court on the trial will be considered in the same order in which they appear upon the record.

The first exception taken is to the ruling of the court below that Anna Bailie, the wife of the deceased, who was made a witness for the defense, should not answer the question put to her by defendant's counsel, to wit: "If you know, state to the jury the comparative strength of the deceased and John S. Wise."

How far the mere opinion or belief of Mrs. Bailie as to the comparative strength of Wise and her husband would have been evidence for the jury, it is not necessary for us to determine, though we incline strongly to the belief that the facts she had previously stated in detail to the jury, of what occurred at the time of the homicide—the grapple, the struggle upon the ground, Bailie uppermost with the knife in his hand, which he had wrenched from Wise—were more legitimate and satisfactory evidence as to which was the stronger than

any answer she would have given in response to the demand of the counsel, if the court had permitted the answer to be given. However this may be, we are unanimously of the opinion that the subsequent admission by the counsel for the state that the deceased was a much stronger man than Wise, as a fact proved, remove all grounds of objection on this point. It admitted as proved all that the most favorable answer which could have been given by the witness would have proved. This last conclusion seems to be well sustained by authority: *Robinson v. Fitchburg & W. R. R. Co.*, 7 Gray, 92; *Stephens v. People*, 19 N. Y. 549; *Commonwealth v. Ohio & Pa. R. R. Co.*, 1 Grant Cas. 329.

The second exception was to the ruling of the court refusing to permit Mrs. Bailie to answer the following question, to wit: "If you know, state to the jury the character and temper of the deceased, Robert Bailie, when angry and excited, and whether or not he was at such times a dangerous or desperate man."

The general rule on this subject is thus stated by Wharton: "On the trial of an indictment for homicide, evidence to prove that the deceased was well known and understood generally by the accused and others to be a quarrelsome and savage man is inadmissible. . . . The rule undoubtedly is, the character of the deceased can never be made a matter of controversy, except when involved in the *res gestæ*": Am. Crim. Law, sec. 641.

In a late case in Massachusetts, the defendant offered to prove that the general character and habits of the deceased were those of a quarrelsome, fighting, vindictive, and brutal man of great strength, as a circumstance tending to show the nature of the provocation under which the defendant acted, and that he had reasonable cause to fear great bodily harm." Objection being made, the court held (Shaw, C. J., and Bigelow and Metcalf, JJ.) that "the evidence was inadmissible. If such evidence were admitted on behalf of the prisoner, it would be competent for the commonwealth to show that the deceased was of a mild and peaceable character. Such evidence is too remote and uncertain to have any legitimate bearing on the question at issue. The provocation under which the defendant acted must be judged of by the *res gestæ*. And the evidence must be confined to the facts and circumstances attending the assault by the deceased upon the defendant": *Commonwealth v. Hilliard*, 2 Gray, 294. So in California in a

case of indictment for murder, the court held the following language:—

“The other point made is the exclusion of evidence of the character of the deceased for turbulence, recklessness, and violence. The rule is well settled that the reputation of the deceased cannot be given in evidence, unless at the least the circumstances of the case raise a doubt in regard to the question whether the prisoner acted in self-defense. It is no excuse for a murder that the person murdered was a bad man, but it has been held that the reputation of the deceased may sometimes be given in proof to show that the defendant was justified in believing himself in danger, where the circumstances of the contest are equivocal. But the record must show this state of case. This does not”: *People v. Murray*, 10 Cal. 809.

The evidence in the case at bar shows the parties to have been some eight or nine paces apart at the time of the shooting,—Wise with a loaded double-barreled shot-gun in his hand, and Bailie with his knife,—and that Bailie had stopped before Wise shot him. Under such circumstances, we think Wise could hardly be justified in considering himself in danger, having so much the advantage in point of arms.

However this may be, the whole circumstances as they were detailed in proof upon the trial, and as they appear before us in the bill of exceptions, are insufficient, in our judgment, to show the character of the deceased, so far as it was necessary or proper to show it on the defense, and as the defendant could not have been prejudiced by the ruling, this court will not disturb the verdict.

The third exception is to the refusal of the judge who tried the cause to charge the jury “that the defendant is entitled to the benefit of every reasonable doubt upon every material fact involved in the case”—which charge the court refused to give as asked for, but charged the jury as follows: “That the defendant is entitled to the benefit of every reasonable doubt of his guilt remaining in the minds of the jury after canvassing the whole of the testimony in the case.”

We think the law on this point is correctly stated by the court, and that the exception was not well taken.

The fourth objection is that the indictment is bad: “1. Because it does not appear from it that it was found by a grand jury of the county of Chase.”

The language of the indictment itself is as follows:—

“State of Kansas, Chase County, *ss.*

“In the district court of the fifth judicial district, sitting in Chase County, April term, A. D. 1863.

“The jurors of the grand jury of the state of Kansas duly drawn, impaneled, charged, and sworn to inquire of offenses committed within the body of the county of Chase, and within the county of Marion, attached to said county of Chase for judicial purposes,” etc.

Section 95 of the Code of Criminal Procedure provides that “the indictment is sufficient if it can be understood therefrom, first, that the indictment was found by the grand jury of the county in which the court is held.”

We think the indictment in this case fully answers this requirement of the statute. Felonies are offenses against the peace and dignity of the state, and are prosecuted and punished by the state. The prosecution is instituted in its name by a grand jury organized in each county in pursuance of the laws of the state, to inquire in its behalf as to infractions of its laws in such county.

2. “The indictment is bad for uncertainty as to the number, location, and character of the wounds, and because it states an impossibility in charging in the second count that Bailie received ‘one mortal wound’ on the mouth and the left side, and upon the throat and near the heart.”

Upon examination of the indictment, it is very apparent that there has been an omission of the word “wounds,” and that the omission being supplied, that part of the indictment excepted to would read as follows:—

“Which said shot so discharged by force of the said gunpowder, did him, the said Robert Bailie, strike and penetrate, giving to him, the said Robert Bailie, then and there, with the shot aforesaid, several [wounds] in and upon the mouth and the left side, and upon the throat and near the heart of him, the said Robert Bailie, one mortal wound, of which said mortal wound the said Robert Bailie did die.” Had such been the reading, it is evident that no exception could have been taken, and if we treat as surplusage the words “several—in and upon the mouth and the left side and,” there still remains a distinct charge of “giving to him, the said Robert Bailie, then and there, with the shot aforesaid, . . . upon the throat and near the heart of him, the said Robert Bailie, one mortal wound, of which mortal wound the said Robert Bailie did die.”

This is certain and explicit, and the words proposed to be omitted do not vitiate nor impair their force.

Section 95, Code of Criminal Procedure, provides that "the indictment is sufficient if it can be understood therefrom. . . .

5. That the offense charged is stated with such a degree of certainty that the court may pronounce judgment upon conviction according to the right of the case"; and section 96 of the same act, that "no indictment may be quashed or set aside. . . . 6. For any surplusage or repugnant allegation when there is sufficient matter alleged to indicate the crime and person charged; nor 7. For any other defect or imperfection which does not tend to the prejudice of the substantial rights of the defendant upon the merits."

In view of these statute provisions we must hold the indictment good beyond question.

Judgment affirmed.

CROZIER, C. J., and KINGMAN, J., concurred.

ADMISSIBILITY OF EVIDENCE OF STRENGTH OF DECEASED on trial for murder: See *Commonwealth v. Mead*, 71 Am. Dec. 741.

EVIDENCE OF VIOLENT AND DESPERATE CHARACTER OF DECEASED is admissible on trial for murder, where the circumstances show that the killing was done in self-defense: *Pritchett v. State*, 58 Am. Dec. 250; *Dukes v. State*, 71 Id. 371; and *Wesley v. State*, 75 Id. 68; and see also *State v. Potter*, 13 Kan. 423; and *State v. Riddle*, 20 Id. 714, where the principal case is followed on this point.

HOMICIDE, WHEN JUSTIFIABLE ON GROUND OF SELF-DEFENSE: See *Goodell v. State*, 80 Am. Dec. 396; *Logue v. Commonwealth*, 80 Id. 481.

REASONABLE DOUBT, DEFINITION OF: See *Rippey v. Miller*, 62 Am. Dec. 183, note; and as to the character of instructions concerning reasonable doubt, see *Monroe v. State*, 76 Id. 53, and note 66.

DESCRIPTION OF WOUND IN INDICTMENT: See *Dukes v. State*, 71 Am. Dec. 371, and note.

CASES
IN THE
COURT OF APPEALS
OF
KENTUCKY.

COLYER v. HIGGINS.

[1 DUVAL, C.]

DUTY OF SHERIFF ELECTED TO TWO SUCCESSIVE TERMS TO EXECUTE WRIT OF VENDITIONI EXPOSAS, issued during his first term, devolves on him by his first term, and where the bond sued on relates only to his second term, it does not bind him or his sureties for the performance of that duty.

WRIT OF VENDITIONI EXPOSAS GIVES NO NEW AUTHORITY TO SHERIFF, but merely commands him to perform his duty under the original writ.

ONE WHO BEGINS EXECUTION OF WRIT OF FIERI FACIAS MUST END IT. —

A sheriff who levies upon property may sell it after the return day, and after returning the execution, without a writ of venditioni exposas, and after he has gone out of office, and it is his duty to do so.

ACTION against sheriff and his sureties upon an official bond. Judgment was rendered against the defendants, and they appealed. The opinion states the case.

***A. J. James*, for the appellant.**

***C. B. Bacheller*, for the appellee.**

By Court, **BULLITT, J.** This is an action against Colyer, the sheriff of Rockcastle County, and his sureties, upon an official bond executed on the 3d of January, 1853, to recover the amount of an execution placed in his hands, and thirty per cent damages for his failure to return the same for thirty days after the return day thereof. A judgment was rendered accordingly against the defendants, from which they appeal.

In our opinion, the plaintiffs have not shown a right to maintain an action upon said bond.

The petition states that, in the year 1852, an execution in favor of the plaintiffs against one Kietley was placed in the hands of said Colyer, sheriff of said county, and was levied by him on some property; that afterward, on the 24th of November, 1852, a writ of *venditioni exponas* was issued thereon, returnable the fourth Monday of January, 1853, and "was also in its lifetime placed in the hands of said Colyer while sheriff as aforesaid"; and that he failed to return the same until the 25th of April, 1853.

Under the constitution of the state, the office of each sheriff expired on the first Monday in January, 1853, or as soon thereafter as his successor was qualified: Art. 6, sec. 4. The facts before mentioned authorize the assumption that Colyer was elected and qualified for two terms, the first of which expired in January, 1853.

It does not distinctly appear, nor does it seem to be material, whether the writ of *venditioni exponas* was delivered to Colyer before or after the expiration of his first term. That writ gives no new authority to the sheriff. It merely commands him to perform his duty under the original writ. According to the settled principles of the common law, he who begins the execution of a writ of *fiore facias* must end it. A sheriff who levies upon property may sell it after the return day, and after returning the execution, without a writ of *venditioni exponas*, and after he has gone out of office; and it is his duty to do so: *Cox v. Joiner*, 4 Bibb, 94; *Wolford v. Phelps*, 2 J. J. Marsh. 81; *Rogers v. Darnaby*, 4 B. Mon. 241; *Irvine v. Picket*, 3 Bibb, 844; *Lofland v. Ewing*, 5 Litt. 42 [15 Am. Dec. 41]; *Neilson v. Churchill*, 5 Dana, 387; *Spang v. Commonwealth*, 12 Pa. St. 360, and cases cited. And if he sells property, he must convey it, though he may have gone out of office: *Allen v. Trimble*, 4 Bibb, 24 [7 Am. Dec. 726]; *Trimble v. Breckinridge*, 4 Id. 479. These principles, so far as they apply to the question under consideration, do not appear to have been changed by statute.

It is clear, therefore, that if Colyer had gone out of office on the first Monday in January, 1853, it would have been his duty to execute the writ of *venditioni exponas*, whether it came to his hands before or after the expiration of his term; and that his sureties (for his first term), would have been liable for his failure to do so. It is equally clear that if he had gone into office for the first time in January, 1853, it would have been the duty of his predecessor, and not his duty, to execute

the writ; and that his sureties in the bond sued upon would not have been liable for his failure to do so. It is evident, therefore, that the duty of executing said writ was devolved upon him by his first, and not by his second, term of office; and that the bond sued upon, which relates only to his second term, did not bind either him or his sureties for the performance of that duty, which appertained to his first term.

But the appellees have a right, independently of the bond, to recover nominal damages from Colyer for failing to return the writ as required by law; and this is the only relief to which their petition shows they are entitled.

Upon other points argued by counsel, we need not express an opinion.

The judgment is reversed, and the cause remanded, with directions to dismiss the petition against the sureties, and for further proceedings against Colyer not inconsistent with this opinion.

NATURE OF WRIT OF VENDEDITIONI EXPOSAS, and power under: *Young v. Smith*, 76 Am. Dec. 81, and note 83; *Lockridge v. Balketa*, 70 Id. 385.

OFFICER WHO LEVIES UPON PERSONAL PROPERTY, MAY SELL IT AFTER RETURN DAY, without a writ of *venditioni exponas*: *Barnard v. Stevens*, 16 Am. Dec. 723; *Young v. Smith*, 76 Id. 84, note. And the principal case is cited to this point, in *Savings Inst. v. Olson*, 7 Bach, 542.

CHRISMAN v. BRUCE.

[1 DUVALL, C.]

MOTIVE OR INTENT WITH WHICH ACT IS DONE, IS GENERALLY MATTER OF PRESUMPTION, depending on the nature of the act, and the circumstances attending its commission.

JUDICIAL OFFICER OF ANY GRADE MUST BE PRESUMED TO HAVE ACTED FROM BAD MOTIVE, where he knowingly and willfully renders a decision contrary to law; and proof of the act will, of itself, authorize the jury to presume the motive.

STATEMENT OF FACTS HELD SUFFICIENT TO SUBJECT JUDGE OF ELECTION TO ACTION, for damages, for unlawfully refusing to receive the vote of a qualified voter.

THE opinion states the case.

W. R. Welch, and *Hunt and Beck*, for the appellant.

By Court, DUVALL, C. J. This action was brought by Chrisman against Bruce to recover damages for the refusal of the

defendant, as judge of an election, to receive the vote of the plaintiff.

On the trial in the court below, the jury, in conformity to a peremptory instruction given by the court, found a verdict for the defendant, and the action was dismissed. From that judgment the plaintiff has prosecuted this appeal.

It is alleged in the petition, in substance, that on the third day of August, 1863, in the county of Jessamine, an election was held for the purpose of choosing a governor and other officers, and that the plaintiff was, at that time, a free white male citizen, more than twenty-one years of age, and had resided in said county more than forty years, and in the precinct more than sixty days immediately preceding the election, and was a resident of said county and precinct when the election was held; that he presented himself at the polls in said precinct to cast his vote for certain candidates for the offices aforesaid, claimed the right to vote, and made the facts as to his age, residence, and citizenship appear to the satisfaction of the defendant, who was one of the judges conducting the election, and to the satisfaction of the judge associated with him; that he was illegally required to swear as a condition precedent to his right to vote, and did swear, that he had not been in the service of the so-called Confederate States, in either a civil or military capacity, nor in the service of the so-called Provisional Government of Kentucky, in either a civil or military capacity, and that he had not taken up arms against the military forces of the United States or the state of Kentucky, and that he had not given voluntary aid and assistance to those in arms against said forces, which oath was required by the provisions of a recent act of the general assembly, and which act is unconstitutional and void; that after he had thus fully shown to the satisfaction of the defendant and his associate that he was a qualified voter, and after he had complied with all the requirements of the act aforesaid, the defendant further questioned the plaintiff, and required him to answer, on oath, whether he was in favor of furnishing the general government with men and money to put down the rebellion; he answered he was, with restrictions,—he did not want them to take his negroes; whereupon the defendant and his associate, well knowing that the plaintiff was legally entitled to vote at said election, did, notwithstanding such knowledge, unlawfully, and under the influence of improper and corrupt motives, refuse to receive plaintiff's vote, or allow

him to cast his vote, whereby he could not, and did not vote; and prays judgment for ten thousand dollars' damages, etc.

The defendant filed an answer, to which the plaintiff demurred, and the demurrer was "sustained *pro forma*." He then filed an amended answer, in which he does not controvert, specifically or generally, the material facts alleged in the petition, except that which charges him with having willfully, and under the influence of impure and corrupt motives, rejected the vote of the plaintiff. He alleges "that the plaintiff, Henry M. Chrisman, is a disloyal man; that he disfranchised himself by publicly advocating the cause of and giving aid and comfort to the so-called Confederate States, who are levying war against, and endeavoring to overthrow the constitution of the state of Kentucky and of the United States"; that the acts mentioned were committed by the defendant before the election held on the third day of August, and after the first day of May, 1862; that the plaintiff is not a qualified voter under the laws of this state, and the defendant was in duty bound to reject his vote because he did not believe him to be a qualified voter, and that he was governed in his action as judge by the laws of Kentucky. That the major-general commanding this department issued an order declaring the state of Kentucky under martial law, which order the defendant was bound to obey, and reject the vote of any disloyal persons; and he did reject plaintiff's vote as that of a disloyal person, embraced by, and coming within the scope of, said order; and he therefore relies for protection from all damages upon the laws of the state of Kentucky, and upon the said order of the major-general commanding.

The facts set forth in this answer were held, on demurrer, to constitute a valid defense to the action, and the parties went to trial on the issues thus formed. But two witnesses testified, and they were introduced by the plaintiff. They proved the qualifications of the plaintiff, as a voter, with respect to his age, citizenship, and residence, and that these qualifications were well known to the officers of the election. The witnesses also detailed what occurred at the time the plaintiff offered to vote, substantially as follows: That the plaintiff, on demanding the right to give his vote, was, in the first place, required to take the oath prescribed by the act referred to in the statement of the pleadings, which requirement was complied with; he was thereupon required, as a further condition, to answer whether he was in favor of men and money to put down the

rebellion; the plaintiff answered that he was, with restrictions, —he did not wish his negroes taken; the defendant then told the plaintiff that he could not vote, and regretted being compelled to reject him.

Whether upon the facts thus admitted, expressly and by implication, in the pleadings, and proved on the trial, the court below properly withdrew the case from the jury by instructing them to find for the defendant, is the question now to be decided.

The question is an important one, involving interests and consequences of great moment, as well to the public as to the citizen.

The courts of Massachusetts, and perhaps of some of the other states, have adhered to the doctrine of the English cases, which decide that an action is maintainable against officers who preside at an election for refusing the vote of a qualified voter, even though they may have exercised an honest and fair judgment on the question before them.

This court has, however, adopted a more equitable and consistent rule, and which more adequately protects such officers in the faithful discharge of their duties. In passing upon the qualifications of a person offering to vote, the judge of the election acts judicially, and is not unfrequently called upon to determine legal questions of great difficulty and doubt. To hold him responsible, in such cases, for a mere error of judgment by which a citizen may have been illegally deprived of his right to vote, would be unjust in principle and unwise in policy; for the natural result would be to deter honest and capable men from accepting an office attended with such hazards. Hence, in the case of *Morgan v. Dudley*, 18 B. Mon. 711, the rule was distinctly announced and acted upon, that, as every human tribunal was liable to err, no judge, even of the most inferior one, should be held responsible for a mere error of judgment committed in the regular discharge of his official duties, and that although the judge of an election may err in determining upon the legality of a vote offered to be given, and thus reject a legally qualified voter, yet, if the decision was the result of a mere error of judgment, and was not induced by improper motives, no action can be maintained on account of such erroneous decision.

But this doctrine, whilst it thus affords protection to the officer in the honest discharge of official duty, does not deny redress to the citizen, who has been willfully and knowingly

deprived of his right to vote. It is an invaluable right. As was said by Lord Holt in a celebrated case, "a right that a man has to give his vote at the election of a person to represent him in Parliament, there to concur in the making of laws which are to bind his liberty and property, is a most transcendent thing": *Ashley v. White*, 2 Ld. Raym. 950. Here, it is the fundamental right; all other rights, civil and political, depend on the free exercise of this one, and any material impairment of it is, to that extent, a subversion of our political system. Hence the care with which any invasion of this right, from every possible source, has been guarded against. The constitution declares that "all elections shall be free and equal"; that "the privilege of free suffrage shall be supported by laws regulating elections, and prohibiting, under adequate penalties, all undue influence thereon from power, bribery, tumult, or other improper practices." The legislature have complied with this mandate by the enactment of laws appropriate to its object. Severe penalties are denounced against persons giving their vote without having the requisite qualifications; also against persons giving or receiving a bribe; also against persons who shall forcibly break up, or attempt to break up or prevent the lawful holding of an election, or who shall so obstruct the same as to prevent any qualified voter from giving his vote; also against any officer of an election "who shall act corruptly, or with manifest partiality" in the discharge of his duty as one of a board for comparing the poll-books, etc.: Sec. 3, art. 12, c. 32. And by section 8 of the same article: "Any judge, sheriff, or clerk who shall receive, or assent to receive or record a vote at an election, at any other time or place than that lawfully appointed; and any judge or sheriff who shall knowingly and unlawfully receive the vote of any other than a qualified voter, or so refuse to receive the vote of a qualified voter,—shall, for every such offense, be imprisoned from one to six months, or fined from fifty to five hundred dollars, forfeit any office he then holds, and be disqualified from ever holding any office."

Such are some of the safeguards which the constitution and laws have provided for the protection of this "transcendent right." But this is not all. The refusal, knowingly and willfully, to receive the vote of a qualified voter, is not only a public offense, subjecting the offender to fine, imprisonment, and disfranchisement, but, as we have already seen, it is a personal wrong, for which the law holds the wrong-doer responsible in damages to the injured party. This responsibility affords

probably a more efficient practical security against wanton violations of the elective franchise than the penal statutes referred to, because more easily and more likely to be enforced. It becomes important, therefore, to ascertain with some degree of precision the grounds on which such responsibility rests.

It appears from the bill of exceptions that the defendant moved the court for the peremptory instruction, "upon the ground that no bad motive in rejecting the plaintiff's vote was proven"; and thereupon the instruction was given. The inference is, that the instruction was based on the ground on which it was asked. It is therefore necessary to determine what amount of evidence, and what character of evidence, was necessary to establish the existence of the bad motive.

It would seem that there could be but little difficulty on this point. The motive or intent with which an act is done is almost always a matter of presumption, depending upon the nature and character of the act, and the circumstances attending its commission. This presumption is said to be the result of a general experience of a connection between certain facts and things, the one being usually found to be the companion or effect of the other: 1 Greenl. Ev., sec. 83. Hence, on a charge of murder, malice is presumed from the fact of killing, unaccompanied with circumstances of extenuation; and the burden of disproving the malice is thrown upon the accused. The same presumption arises in civil actions, where the act complained of was unlawful; because, as men seldom do unlawful acts with innocent intentions, the law presumes every act in itself unlawful to have been criminally intended until the contrary appears: 1 Id. 44. In view of these familiar and well-settled principles, it is perfectly clear that a judicial officer of any grade who shall, in the exercise of his functions, knowingly and willfully render a decision which is contrary to law, and which violates a right and inflicts an injury, must be presumed to have acted under the influence of a bad motive. In an action against such officer, proof of the act would be sufficient to authorize the jury to presume the motive. It is a mistake to suppose that there is anything in the cases of *Morgan v. Dudley*, 18 B. Mon. 711, and *Caulfield v. Bullock*, 18 Id. 494, in conflict with this general doctrine. On the contrary, they are in perfect harmony with it. The allegation in both cases was, that the defendant, "knowingly and willfully, with an unlawful intention, refused to receive the plaintiff's vote"; and the allegation was held sufficient, being very properly construed to mean that the defendant knew the plaintiff was entitled to

vote, but had, notwithstanding such knowledge, willfully, and from improper motives, refused to receive his vote.

The question, then, to be decided on this record is, whether the facts before the jury conduced to show that the plaintiff was a qualified voter, and that the defendant knowingly and willfully violated the law by refusing to receive his vote. If so, the jury had a right to find that it was done with a bad motive.

Recurring again to the facts, we find that it is alleged and proved, and admitted by the pleadings, that the plaintiff was, in respect to age, citizenship, and residence, a qualified voter, under the constitution and laws of the state; that upon claiming to exercise his right as such, he manifested his legal qualification as a voter to the satisfaction of the defendant and of his associate; that on being required, he took the oath prescribed by the statute; that he was further required to answer on oath whether he was in favor of furnishing men and money to put down the rebellion, to which he responded as already stated; and that thereupon his vote was rejected. On the part of the defendant, no attempt was made to prove any of the matters of defense set up in the answer.

Such was the case as made out before the jury. It was simply the case of a legally qualified voter, known to be such by the defendant, who, without excuse or even pretext, was denied the exercise of his right. Upon this case, the court below held that the defendant was not responsible in damages. In that decision we cannot concur. To require additional or stronger evidence, either of the act of the defendant or of the motive which actuated him, to authorize the jury to find for the plaintiff, would be practically to deny all remedy for such a wrong. What excuse or pretext was there, so far as the record shows, for rejecting the plaintiff's vote, except his response to the defendant's interrogatory? And who would say, as matter of law, that that response afforded the slightest justification of the wrong? The jury were authorized to presume that this was not the case of a mere error of judgment, committed by the defendant in passing upon the qualifications of a voter. No question as to qualification was raised or decided. The plaintiff's vote was refused for no other reason, and on no other ground, than his expression of the wish that his negroes should not be taken. The defendant avers in his defense that he was governed in his official action by the laws regulating elections, and the fact of his appointment affords a presumption that he

was not ignorant of those laws. It was therefore for the jury to determine, upon the facts before them, whether, in the light of those laws, the rejection of the vote, upon such a pretext, was the result of an honest, though erroneous, conviction of the judgment, or whether it was not the result of an improper motive, influencing the defendant to commit a wanton and intentional violation of the plaintiff's clear and well-understood legal right.

What their determination might or should have been, is a matter with which we have nothing to do, and in regard to which we express no opinion. We merely decide that the evidence in this record would have sustained a verdict for the plaintiff; and that the jury should, for that reason, have been allowed to pass upon it.

Nor is it deemed at all material, as the case now stands, to consider the several matters of defense set up in the answer, the sufficiency of which was called in question by the demurrer.

For the reasons stated, the judgment is reversed, and the cause remanded for a new trial and further proceedings not inconsistent with the principles of this opinion.

LEGAL PRESUMPTION MUST BE BASED UPON FACTS: *Pennington v. Yell*, 53 Am. Dec. 262; and facts from which presumptions arise must be clearly and satisfactorily proved: *Danley v. Rector*, 50 Id. 242.

PRESUMPTION EXISTS IN FAVOR OF ACTS OF PUBLIC OFFICERS: *Commonwealth v. Skifer*, 64 Am. Dec. 680; *Wood v. Chapin*, 67 Id. 73, note.

PRESUMPTIONS BETWEEN WRONG-DOER AND PERSON WRONGED should be in favor of latter: *Costigan v. Mohawk etc. Co.*, 43 Am. Dec. 758.

PRESUMPTION OF MALICE FROM WRONGFUL ACT: See *Commonwealth v. Webster*, 52 Am. Dec. 711; *Commonwealth v. York*, 43 Id. 373; *Treson v. Madden*, 66 Id. 198.

COOPER v. POSTON.

[1 DUVALL, 92.]

IT MUST BE PRESUMED IN BEHALF OF ASSIGNEE OF NOTE that the payer and payee are different persons, when they are of the same name. The legal presumption is in favor of the validity of the contract.

IN ACTION ON NOTE BY ASSIGNEE THEREOF, PLAINTIFF NEED NOT AVER that the defendant and payee are different persons. The fact that they are the same person is matter of defense properly coming from the other side.

AS GENERAL RULE, PLAINTIFF NEED NOT ANTICIPATE MATTERS OF DEFENSE, and is required only to state facts which constitute, *prima facie*, a cause of action.

WHERE PLAINTIFF ASSIGNED NOTE PENDING ACTION, and he and his assignee filed an amended petition alleging that fact: *Held*, that a judgment in favor of the plaintiff was a clerical misprision, and besides, was not prejudicial to the defendant.

WHERE ONLY DEFENSE TO ACTION ON NOTE IS USURY, and the verdict was, "We, of the jury, find for the plaintiff," a judgment rendered against the defendant for the amount of the note with interest is proper.

IN CASES ONLY INVOLVING QUESTIONS OF VALUE AND DAMAGE as questions of fact, the jury must, as a general rule, assess the amount of recovery.

ACTION on promissory note. The opinion states the case.

G. Smith and B. F. Buckner, for the appellant.

J. B. Huston and C. Eginton, for the appellee.

By Court, BULLITT, J. We cannot assume that the defendant, Mary Cooper, the payor, is the same person as Mary Cooper, the payee. There may be two persons of the same name. The legal presumption is in favor of the validity of the contract.

In behalf of the assignee of the note, it must be presumed, *prima facie*, that the payor and payee are different persons; and in the absence of evidence upon the subject, it was the duty of the jury so to find. Moreover, if necessary to sustain the judgment, it would be our duty to presume, in the absence of a bill of exceptions, that the payor and payee were proved to be different persons.

It was not necessary for the plaintiff to aver that the defendant and the payee are different persons. This averment is dispensed with, not because the law presumes that fact *prima facie*, but because the plaintiff's cause of action is founded, not upon that fact, but upon the fact that the defendant executed the note. As a general rule, the plaintiff is required only to state facts which constitute, *prima facie*, a cause of action, and need not anticipate matters of defense. The plaintiff, by stating the execution of the note by the defendant, the assignment of it to the plaintiff, and the breach by non-payment, made out a *prima facie* case.

If the payor and payee are the same person, that fact is matter of defense properly coming from the other side. It would, perhaps, be as reasonable to require the plaintiff to allege that the defendant was of sound mind, twenty-one years old, and unmarried, as to require him to allege that she executed the note to a person different from herself. But it is contended that the court erred in rendering judgment in favor of the plaintiff, Poston, because he and Flanagan filed an

amended petition alleging that, pending the action, Poston assigned the note to Flanagan, and asking for a judgment in favor of Flanagan. But this error cannot avail the appellant, because, first, it is a clerical misprision: *Oldham v. Brannon*, 2 Met. (Ky.) 302; and as no motion was made to correct it in the court below, it cannot be corrected here: Code, sec. 577. And secondly, the error was not prejudicial to the appellant. She presented no set-off nor counterclaim against Flanagan. It is immaterial whether she is compelled to pay the money to him or to Poston. As Flanagan was a party to the action, the judgment, though erroneous, is not void as to him. Payment to Poston by the appellant before notice of a motion by Flanagan to correct the error, or of his intention so to move, will bar any claim on the part of Flanagan. Our opinion upon this point does not conflict with the decision in *Oldham v. Brannon*, *supra*, because in that case the payment was made to the assignor before the rendition of the judgment in his favor.

Assuming as we must do, that the note is obligatory upon the appellant as payor, the only material issue was, whether or not any usury was embraced in it. The verdict was, "we, of the jury, find for the plaintiff." The court thereupon rendered a judgment against the appellant for the amount of the note, with interest. It is contended that the verdict did not authorize the judgment, because section 359 of the code declares that, "where by the verdict either party is entitled to recover money of the adverse party, the jury, in their verdict, must assess the amount of recovery." We have a different opinion. Questions relating to value and damage are questions of fact. As a general rule, in cases involving such questions, the jury must assess the amount of recovery. In our opinion, section 359 of the code relates only to such cases. We may waive the question whether or not the legislature can take from the courts, and give to juries, the authority to decide legal questions, because we are satisfied that the framers of the code did not mean to do so. That they did not so intend is proved conclusively by section 416 of the code, which declares in substance that judgment shall be rendered in conformity to the pleadings, notwithstanding a verdict to the contrary. In an action upon a note for a certain sum of money, if there is no valid defense, the amount of recovery depends upon the construction of the pleadings and the contract. Such cases present purely legal questions. In the case under con-

sideration, the only obstacle to the plaintiff's recovery was the plea of usury. The verdict showed that there was no usury in the note. The pleadings and contract showed the amount which the plaintiff was entitled to recover. The law made it the duty of the court to render a judgment therefor.

The judgment is affirmed.

CONTRACTS SHOULD BE SO CONSTRUED AS TO RENDER THEM VALID AND EFFECTUAL: *Anderson v. Baughman*, 74 Am. Dec. 699.

COMPLAINT OR PETITION UNDER CODE IS GOOD AFTER VERDICT, where it states facts constituting a *prima facie* case: *Brice v. Shafter*, 72 Am. Dec. 613.

VERDICT, "WE FIND FOR THE PLAINTIFF," without stating value of property, when sufficient: *Avery v. Avery*, 62 Am. Dec. 513; and see *Conner v. Winston*, 65 Id. 761.

VERDICT FOR "AMOUNT DUE ON THE DRAFT, WITH USUAL INTEREST," is sufficiently certain: *Mohs v. Fellman*, 67 Am. Dec. 656.

SAYRE v. LOUISVILLE UNION BENEVOLENT ASSOCIATION.

[1 DUVALL, 142.]

POWER OF CORPORATION TO MAKE BY-LAWS IS LIMITED BY NATURE OF CORPORATION, and the laws of the country. It can make no rule contrary to law, good morals, or public policy.

PUBLIC POLICY DOES NOT FORBID COMBINATION OF WORKMEN, WHO ARE BOUND BY NO CONTRACT, for the purpose of obtaining reasonable prices for their labor. And common carriers may guard themselves against undue competition reducing freights below a fair compensation.

AGREEMENT BY MEMBERS OF ASSOCIATION IS ILLEGAL AND VOID, the terms of which are, that no one should carry freight for less than the rate fixed by the association, without regard to the question whether the rate was reasonable or not.

ACTION against member of benevolent association to recover dues and fines. Judgment was rendered for the sum claimed, and the defendant appealed. The opinion states the case.

Jefferson Brown, for the appellant.

C. Ripley, for the appellees.

By Court, BULLITT, J. The Louisville Union Benevolent Association was incorporated by an act of the legislature, with authority to afford relief and assistance to its sick or disabled members, and to the families of deceased members; to sue and defend, and acquire, hold, and dispose of any kind of

property; to "create a fund by initiation fees, dues, contributions, or otherwise"; "to adopt such rules for their mutual interest as individuals, and as common carriers, as to them shall seem proper and promotive of mutual confidence and good-will; and to recover all such fees, fines, or contributions as any member may be liable by the terms of their by-laws to pay, in the same manner as other debts due to the association; and to make by-laws for their government, and for prescribing the terms of admission and continuance of members; provided, such by-laws shall not be repugnant to the laws and constitution of the commonwealth."

The association adopted by-laws, excluding from membership any person who has not been a captain, owner, or part owner of a steamboat on the Mississippi or Ohio River, or tributaries; declaring that no member "shall go into any river or trade and work for less than the wages, nor take, bargain for, or carry any freight for less than the established rate in the trade"; and that any member so doing shall be fined not less than one nor more than ten hundred dollars; prohibiting the members from employing agents who do not belong to the association, or to some association acting in concert with it; prohibiting members from advertising or working for any boat not represented in this or some other association acting in concert with it; requiring each member to pay certain monthly dues, and certain tonnage dues for each trip he may make with any steamer, and certain fines for non-attendance, and additional fines for failing to pay fines or other dues; and making provision for the relief of sick or disabled members, and for the families of deceased members, and other provisions which we need not notice.

The appellant, Sayre, became a member of the association, and like the other members, expressed his consent to the by-laws by subscribing his name to them.

The association sued him for the sum of \$329.45. The claim consists of tonnage and monthly dues to the amount of \$19.45; fines, for not paying said dues to the amount of \$60; and a fine of \$250 for carrying freight for less than the established rate.

A demurrer to the petition having been overruled, the defendant answered that the association was not authorized to make said by-laws, and that the same were illegal; and presented other defenses, which were not sustained by proof, and need not be noticed.

A judgment was rendered for the sum claimed in the petition, from which Sayre appeals.

The power of a corporation to make by-laws for the government of its members does not authorize it to violate law, nor to require its members to do so. The power is limited by the nature of the corporation and the laws of the country. It can make no rule which is contrary to law, good morals, or public policy: Angell and Ames on Corporations, sec. 335, and cases cited.

To what extent the courts can or should interfere in the never-ceasing contest between capital and labor, between buyers and sellers, between consumers and producers, is a question of some difficulty. In the case of *Regina v. Rowlands*, 17 Q. B. 686, note a, S. C., 79 Eng. Com. L. 685, note a, the court of queen's bench is reported to have seen no objection to Justice Erle's instructions to the jury, in which he said: "The law is clear that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand. . . . But I consider the law to be clear so far only as while the purpose of the combination is to obtain a benefit for the parties who combine,—a benefit which by law they can claim. I make that remark because a combination for the purpose of injuring another is a combination of a different nature, directed personally against the party to be injured; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the hurt of another. The rights of workmen are conceded; but the exercise of free will and freedom of action, within the limits of the law, is also secured equally to the masters. The intention of the law is at present to allow either of them to follow the dictates of their own will, with respect to their own actions and their own property; and either, I believe, has a right to study to promote his own advantage, or to combine with others to promote their mutual advantage." The doctrine of that case seems to be that, as a workman, who is bound by no contract, may lawfully demand any wages that he may choose, any number of workman may lawfully combine for the same purpose. And in *Commonwealth v. Hunt*, 4 Met. 111 [88 Am. Dec. 346], the reasoning of the court apparently leads to the same conclusion, though the point was not decided.

But in New York, under a statute declaring that "if two or

more persons shall conspire to commit any act injurious to trade or commerce, they shall be deemed guilty of a misdemeanor," it seems to have been held that all combinations of workmen to raise their wages are necessarily injurious to trade or commerce, and indictable as misdemeanors under the statute; and the court expressed the opinion that, by the common law, such combinations were indictable as conspiracies: *People v. Fisher*, 14 Wend. 19 [28 Am. Dec. 501].

It seems to be doubtful whether either of those positions is correct. It is entirely consistent with the interest of the public that labor shall be fairly rewarded. If the employer of a number of workmen should refuse to pay them fair wages, why may they not, if bound by no contract, combine for the purpose of obtaining reasonable prices for their labor? We do not perceive that the public would be injured by it, nor any principle upon which it can be condemned as illegal. But suppose that four cents per bushel is a reasonable price for mining coal, and that the miners of the country should combine for the purpose of extorting eight cents per bushel; that would certainly be injurious to the public, whilst it would not be supported by any moral right on the part of the conspirators. Mr. Wharton lays it down, upon the authority of several cases, that combinations to prejudice the public, by unduly elevating or depressing the prices of wages, of tolls, or of any merchantable commodity, are indictable as conspiracies: 1 Am. Crim. Law, 786. And Mr. Chitty places conspiracies to injure public trade upon the same ground as conspiracies "to affect public health, to violate public police, to insult justice, or to do any act in itself illegal": 3 Chitty's Crim. Law, 1139.

In this case, however, we need not go so far as the last-mentioned authorities seem to justify. A common carrier cannot, like a merchant or mechanic, consult his pleasure or caprice as to the conduct of his business. The law makes it his duty, when he can conveniently do so, to receive and carry goods for any person whatsoever, for a reasonable hire: Story on Bailments, sec. 508. The public interest does not, we believe, forbid carriers from guarding themselves against undue competition, reducing freights below the standard of fair compensation; and we should hesitate to condemn an agreement between carriers not to carry goods for less than a certain, reasonable price. But in the case under consideration, the members agreed that no one should carry freight for less than the rate fixed by the association, without reference to the ques-

tion whether the rate was reasonable or not. We find nothing in the charter from which it can be reasonably inferred that the legislature meant to authorize such a combination.

In our opinion, the by-law under which the fine of \$250 was imposed upon Sayre was illegal and void, notwithstanding his assent thereto; but the association is entitled to a judgment for the residue of the money claimed in the petition.

The judgment is reversed, and the cause remanded, that judgment may be rendered in conformity to this opinion.

VALIDITY OF BY-LAW OF CORPORATION IS PURELY QUESTION OF LAW to be determined by the court: *State v. Overton*, 61 Am. Dec. 671.

POWER OF CORPORATION TO MAKE AND ENFORCE BY-LAWS: *Cahill v. Kalamazoo etc. Co.*, 43 Am. Dec. 457; by-law is void if contrary to law: *Matter of Long Island R. R. Co.*, 32 Id. 429; or is unreasonable: *Palmetto Lodge v. Fleming*, 49 Id. 604.

WAIVER OF BY-LAW BY CORPORATION: *Campbell v. Insurance Co.*, 72 Am. Dec. 324, and note 331.

BY-LAW VOID IN PART, WHEN NOT WHOLLY VOID: *Rand v. Mather*, 59 Am. Dec. 131, and note 135.

PROOF OF BY-LAWS: *Haven v. New Hampshire Asylum*, 38 Am. Dec. 512.

BY-LAWS OF MUNICIPAL CORPORATION: See *Robinson v. Mayor etc.*, 34 Am. Dec. 625, and note 631; *Mobile v. Yenville*, 36 Id. 441; *Tanner v. Trustees*, 40 Id. 337; *Floyd v. Commissioners*, 58 Id. 559.

AGREEMENT BY WHICH SEVERAL TRANSPORTATION COMPANIES COMBINE for the purpose of destroying competition, and establishing uniform rates of freight, is injurious to trade and commerce, and against public policy: *Hooker v. Vandewater*, 47 Am. Dec. 258; *Stanton v. Allen*, 49 Id. 282, and cases collected in note 286; and see *Beard v. Dennis*, 63 Id. 380, and note.

CONTRACT CREATES NO MONOPOLY WHICH RESTRAINS COMPETITION BY ONLY ONE PERSON, leaving all others free to enter into the same business: *California Steam Nav. Co. v. Wright*, 65 Am. Dec. 511.

WHAT BY-LAWS PRIVATE CORPORATION AGGREGATE MAY ADOPT. — 1. *What is By-law, and Power of Corporation to Make.* — A by-law is defined to be "a rule or law of a corporation for its government. It is an act of legislation, and the solemnities and sanction required by the charter for its passage must be observed": *Drake v. Hudson River R. R. Co.*, 7 Barb. 506, 539. Again, it is said, the term "by-laws" has a peculiar and limited signification; and is used to designate "the orders and regulations, which a corporation, as one of its legal incidents, has power to make, and which is usually exercised to regulate its own action and concerns, and the rights and duties of its members among themselves": *Commonwealth v. Turner*, 1 Cush. 493, 496; and see *Flint v. Pierce*, 99 Mass. 68, 70. But although a by-law is made by and is applicable to a particular body, it is still a law, and is to be applied whenever the circumstances arise for which it was intended to provide: *Gosling v. Veley*, 7 Q. B. 451; 19 L. J., N. S., 135; and see *Hopkins v. Mayor*, 4 Mass. & W. 640. A distinction taken between a by-law of a corporation and a regulation is, that the validity of the former is a judicial question, while the latter is regarded as a matter in pais: *Compton v. Railroad Co.*, 34

N. J. L. 134, following *State v. Overton*, 24 Id. 440; S. C., 61 Am. Dec. 671; *Morris etc. R. R. Co. v. Ayres*, 29 Id. 393. The word "ordinance" is generally employed to denote the laws adopted by public or municipal corporations, though the term is said to be analogous to, if not entirely identical with, "by-law": See *Robinson v. Mayor*, 1 Humph. 156; S. C., 34 Am. Dec. 625, and note 631; *Blanchard v. Bissell*, 11 Ohio St. 96.

A private corporation aggregate has inherent power to make necessary rules for its government and operations: *Drake v. Hudson River R. R. Co.*, 7 Barb. 508; *Martin v. Nashville Build. Assoc.*, 2 Cold. 418. And by-laws of a corporation, adopted in conformity with the provisions of its charter, are equally binding on the several individual members of the corporation, as any public law of the state: *Cummings v. Webster*, 43 Me. 192; and see *Weatherly v. Med. & Surg. Soc.*, 76 Ala. 567; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 179. In the absence of a law or custom to the contrary, the power to make by-laws resides in the members of the corporation at large: *Salem Bank v. Gloucester Bank*, 17 Mass. 129; *Martin v. Nashville Build. Assoc.*, 2 Cold. 418; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; *Morton Gravel Road Co. v. Wyong*, 51 Ind. 4; *State v. Owtis*, 9 Nev. 335; but the body at large may delegate the power to a select body, which then represents the whole community, and a majority of that body will constitute a quorum: *Ex parte Willcocks*, 7 Cow. 402; S. C., 17 Am. Dec. 525; *Oahill v. Kalamazoo Mut. Ins. Co.*, 2 Doug. 124. The board of directors have no power to make by-laws without special authority: *Carroll v. Sav. Bank*, 8 Mo. App. 249. If the charter prescribes any formality as to the adoption of by-laws, it must be observed: *Dunston v. Imperial Gas Light Co.*, 3 Barn. & Adol. 125; but if the charter is silent as to the matter, they may be adopted as well by the acts and uniform course of proceedings of such corporations, as by an express vote or an adoption manifested in writing; Id.; *Fairfield Turnpike Co. v. Thorp*, 13 Conn. 173; *Langedale v. Boston*, 12 Ind. 467. In the case of an express grant of the power to enact by-laws limited to certain specified cases and for certain purposes, the corporate power of legislation is confined to the objects specified, all others being excluded by implication: *Child v. Hudson's Bay Co.*, 2 P. Wms. 207; Angell and Ames on Corporations, sec. 325; *State v. Ferguson*, 33 N. H. 424, 430; and see *State v. Mayor etc.*, 33 N. J. L. 57.

2. *Validity of By-laws.* — As incident to the right of corporations to manage and control their affairs is the right to make such by-laws as will best effectuate the objects proposed to be accomplished. And those duly made, so far as they do not contravene any public law or principle of public policy, are obligatory upon all the members: *Weatherly v. Med. & Surg. Soc.*, 76 Ala. 567; *Carne v. Brigham*, 39 Me. 35; *German etc. Cong. v. Pressler*, 17 La. Ann. 128. Their requirements being just and reasonable, violating no law, either moral or statutory, and being adopted and agreed to by the members, they must be complied with, in order to secure the benefits arising from connection with the incorporation: *Harrington v. Workmen's Ben. Assoc.*, 70 Ga. 341; and see *Poultney v. Bachman*, 31 Hun, 49; *Security Loan Assoc. v. Lake*, 69 Ala. 456. Generally speaking, all by-laws of a corporation are good, which are reasonable, and calculated to carry into effect the objects of the incorporation, and are not contradictory to the general policy of the laws of the land: *State v. Tudor*, 5 Day, 329, 333; S. C., 5 Am. Dec. 162. They must, however, be certain, must be directed to all within the sphere of their operation, and must operate equally: *Goddard v. Merchants' Exchange*, 9 Mo. App. 290, 295; *Stewart v. Father Matthews Soc.*, 41 Mich. 67; *Cartan v. Father Matthews Soc.*, 3 Daly, 20; *People v. Medical Soc.*, 24 Barb. 570. And by-laws which

are contrary to the charter of the company, — *Am. Legion of Honor v. Perry*, 140 Mass. 580; *Presbyterian Mut. Assurance Fund v. Allen*, 106 Ind. 593; *State v. Curtis*, 9 Nev. 325; *Bergman v. St. Paul etc. Build. Assoc.*, 29 Minn. 275; *Kent v. Quicksilver Min. Co.*, 78 N. Y. 182, — or contrary to a law of the state or to the constitutional law of the land, are void: *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; *People v. Crockett*, 9 Cal. 112; *Pulford v. Fire Department*, 31 Mich. 458; *Bullard v. Bank*, 18 Wall. 589; *People v. Benevolent Soc.*, 3 Hun. 361. So by-laws in restraint of trade are void, as held in the principal case: See also *Butchers' Benevolent Association*, 35 Pa. St. 151; *Moore v. Bank of Commerce*, 52 Mo. 377; *Clark v. Lecren*, 9 Barn. & C. 52. By-laws in violation of the common law are void: *Hayden v. Noyes*, 5 Conn. 391; *Pulford v. Fire Department*, 31 Mich. 458. But it is held in a recent Missouri case that if by-laws are not unreasonable, or contrary to the policy of the law, the fact that they may introduce a new rule which is not the rule of the common law, does not militate against their validity: *Goddard v. Merchants' Exchange*, 9 Mo. App. 290; S. C. affirmed, 78 Mo. 609. And if a by-law consists of several distinct and separable parts, some of which are unauthorised and void, this does not affect the validity of the other parts: *Shelton v. Mayor etc.*, 30 Ala. 540; *Amesbury v. Bowditch Mut. Ins. Co.*, 6 Gray, 596; *Clegg v. Financial Co.*, L. R. 16 Eq. 363.

3. *By-laws Which have been Sustained as Valid.* — Reasonable by-laws of a corporation regulating the manner of holding meetings and electing the officers of the corporation are sustained as proper: *In re Long Island R. R. Co.*, 19 Wend. 37; *Kearney v. Andrews*, 10 N. J. Eq. 70; *Taylor v. Griswold*, 14 N. J. L. 222, 226; and in this connection, it is held that a by-law authorizing the members to vote at all elections by proxy is valid: *State v. Tudor*, 5 Day, 329; S. C., 5 Am. Dec. 162; *People v. Crossley*, 69 Ill. 195. But see *Taylor v. Griswold*, 14 N. J. L. 222; *Phillips v. Wickham*, 1 Paige, 590; *People v. Treadwell*, 18 Hun. 427, holding that a member of a corporation is not entitled to vote by proxy, unless specially authorized by legislative sanction. By-laws regulating the transfer of stock are sustained, if reasonable: *Farmers' etc. Bank v. Wason*, 48 Iowa, 339; *Chouteau Spring Co. v. Harris*, 20 Mo. 383; but a by-law which unreasonably interferes with the free exercise of the right to transfer stock is void, as being in restraint of trade: *Id.*; *Moore v. Bank of Commerce*, 52 Mo. 377; *Quiner v. Marblehead Ins. Co.*, 10 Mass. 476. A by-law requiring the officer or agent having charge of the corporate funds to give bond for the faithful performance of the duties of his office is reasonable and valid: *Savings Bank v. Hunt*, 72 Mo. 597. So a by-law of a corporation formed to establish and maintain uniformity in insurance, which binds the members to such uniformity in their rates, is not contrary to public policy, nor in restraint of trade, nor unreasonable: *People v. Board of Fire Underwriters*, 54 How. Pr. 240. So a by-law of a board of trade providing that "on all sales of grain in bulk on elevator receipts the buyer shall pay the first two days' storage, unless otherwise specified at the time of sale," may be enforced, although this be not the rule of the common law: *Goddard v. Merchants' Exchange*, 9 Mo. App. 290; S. C. affirmed, 78 Mo. 609.

Reasonable by-laws regulating the conduct of members and providing for their suspension or expulsion for breaches of corporate duty, are sustained. It is indeed the office of a by-law to regulate the conduct and define the duties of the members towards the corporation and between themselves: *Flint v. Pierce*, 99 Mass. 68, 70. Thus, a by-law of a chamber of commerce, providing for the expulsion of a member for non-compliance with the terms of any contract, whether verbal or written, is reasonable and valid, and may be

enforced, although the contract violated was void by the statute of frauds, or as not made "during a season of change": *Dickenson v. Chamber of Commerce*, 29 Wis. 45; and see *State v. Milwaukee Chamber of Commerce*, 47 Id. 670; *White v. Brownell*, 4 Abb. Pr., N. S., 162; S. C., 2 Daly, 329; *People v. Board of Trade*, 80 Ill. 134; *Fisher v. Board of Trade*, 80 Id. 85; *Baxter v. Board of Trade*, 83 Id. 146; *Sturges v. Board of Trade*, 86 Id. 441; *People v. New York Com. Assoc.*, 18 Abb. Pr. 271; *People v. Miller*, 39 Hun, 557. So, by-laws adopted by the trustees of an asylum forbidding the inmates to leave the premises without permission from the governor of the asylum or one of his assistants, or indulging in contention, or boisterous and disorderly conversation, on pain of expulsion, are reasonable, proper, and valid: *People v. Sailors' Snug Harbor*, 54 Barb. 532. And the courts very rarely interfere to control the enforcement of by-laws of merely voluntary associations, created for the advancement of religious, moral, or social principles, or merely for amusement: See *People v. Board of Trade*, 80 Ill. 134; *Hussey v. Gallagher*, 61 Ga. 86; *Dawkins v. Autrobus*, L. R. 17 Ch. Div. 615; *Lafond v. Deems*, 81 N. Y. 507; *Savannah Cotton Exchange v. State*, 54 Id. 668; *People v. St. George's Soc.*, 28 Mich. 261; *Lafond v. Deems*, 52 How. Pr. 41; S. C., 1 Abb. N. C. 318; *Olery v. Brown*, 51 How. Pr. 92; *Loubat v. Le Roy*, 15 Abb. N. C. 1, and note 44. The by-laws of such associations, whether reasonable or not, bind the members: *Ellis v. Alford*, 1 City Ct. Rep. (N. Y.) 123; *Kehlendeck v. Logeman*, 10 Daly, 447. If any of them are inconvenient, or embarrassing in administration, this furnishes no excuse for disobeying them, although it may suggest the expediency of their alteration: See *Weatherly v. Med. & Surg. Soc.*, 76 Ala. 567. They must not, however, be inconsistent with the general municipal law; and when a member refuses to submit to expulsion, which involves a battery, it cannot be lawfully inflicted, although warranted by the by-laws: *State v. Williams*, 75 N. C. 134. So, the provisions of the constitution of such an association must be strictly followed in all proceedings for the expulsion of a member: *Loubat v. Le Roy*, 15 Abb. N. C. 1; S. C., 40 Hun, 546; *Wachtel v. Noah Widows' etc. Soc.*, 84 N. Y. 28; *Labouchere v. Earl of Wharnclyffe*, L. R. 13 Ch. Div. 346; and especially when it is sought to expel a member for a supposed violation of the by-laws: *Foster v. Harrison*, 15 Abb. N. C. 45.

A by-law of a benefit society providing that benefit shall be withheld from widows of members who die through intemperance, debauchery, etc., has been sustained as reasonable: *St. Mary's etc. Soc. v. Burford*, 70 Pa. St. 321; but otherwise, of a by-law operating as a forfeiture of the widow's right to the benefits, because the member's dues, although fully satisfied, were not paid at the precise time required: *Buecking v. Robert Blum Lodge*, 1 City Ct. Rep. (N. Y.) 51; and compare *Cartan v. Father Mathew Soc.*, 3 Daly, 20. And a member of such society can only be expelled, under by-laws providing for expulsion, after notice of the charges against him, and an opportunity to be heard: *People v. Ben. Soc.*, 24 How. Pr. 216; *Downing v. St. Columbia's Soc.*, 10 Daly, 282; *Frits v. Muck*, 62 How. Pr. 69; and see *Fisher v. Keane*, L. R. 11 Ch. Div. 353; *Loubat v. Le Roy*, 40 Hun, 546. But compare *Lekman v. District No. 1 of B. B.*, Abb. An. Dig. 1885, S. C. affirmed, 23 N. Y. Week. Dig. 409, 39 Hun, 658, holding that a by-law was not necessarily unreasonable and void, because it provided for the suspension of a member upon a mere declaration of the president, without a trial or opportunity to be heard.

4. *By-law cannot Abridge or Enlarge Corporate Powers, or Disturb Vested Rights.* — The power of a corporate body to make by-laws is limited to the enactment of such as are not inconsistent with the constitution and the law.

And since the powers of a corporation are derived from the law, no by-law can abridge or enlarge those powers: See *Brewster v. Hartley*, 37 Cal. 15; *Great Falls etc. Ins. Co. v. Harvey*, 45 N. H. 292; *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; *Railway Co. v. Allerton*, 18 Wall. 233. Thus, where the statute gives the stockholders of a corporation the power to elect its directors, the corporation cannot, by its by-laws, either give or take it away: *Brewster v. Hartley*, 37 Cal. 15, 24. So, where the charter of an insurance company authorizes insurance against fire only, a by-law referred to in the policy, recognising damages by lightning as one of the risks assumed, imposes no obligation upon the company to pay for losses other than by fire: *Andrews v. Union etc. Ins. Co.*, 37 Me. 256. And a by-law that will disturb a vested right of any share-holder is clearly unauthorized and void: *Gray v. Portland Bank*, 3 Mass. 363; *People v. Crockett*, 9 Cal. 112; *People v. Fire Department*, 31 Mich. 458. And although the power is reserved to a corporation by its charter to alter, amend, or repeal its by-laws, it cannot repeal a by-law so as to impair rights which have been given and become vested by virtue of the by-law: *Kent v. Quicksilver Mining Co.*, 78 N. Y. 159; affirming S. C., 12 Hun, 53. When neither the charter of a corporation, nor any general statute, imposes on the individual members a liability to pay its debts, such liability cannot be created by any by-law or vote of the corporation: *Trustees etc. v. Flint*, 13 Met. 539; *Kennebec etc. R. R. Co. v. Kendall*, 31 Me. 470; *Reid v. Babington Mfg. Co.*, 40 Ala. 98. But according to the weight of authority, a by-law creating a lien on the stock of a share-holder, for debts due from the share-holder to the corporation, is valid and binding: *People v. Crockett*, 9 Cal. 112; *Mechanics' Bank v. Merchants' Bank*, 45 Mo. 513; *Spurlock v. Pacific R. R. Co.*, 61 Id. 319; *Farmers' etc. Bank v. Wasson*, 48 Iowa, 336; *Planters' etc. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308; *Young v. Fough*, 23 N. J. Eq. 325; *Bank of Holly Springs v. Pinson*, 58 Miss. 421; *Pendergast v. Bank of Stockton*, 2 Saw. 106; *Knight v. Old Nat. Bank*, 3 Cliff. 429; there is, however, strong authority to the effect that such a by-law would not affect subsequent purchasers for value without notice: *Anglo-Cal. Bank v. Grangers' Bank*, 63 Cal. 359; *Driscoll v. West Bradley etc. Co.*, 59 N. Y. 96; *Conklin v. Second Nat. Bank*, 45 Id. 655; *Merchants' Bank v. Shouse*, 102 Pa. St. 438; *Carroll v. Sav. Bank*, 8 Mo. App. 249; *Petot v. Johnson*, 33 La. Ann. 1286; *Bullard v. Bank*, 18 Wall. 589; *Bank v. Lanter*, 11 Id. 369.

5. *By-laws Restricting Right to Sue.* — The right to sue is one given by law, and it is an established principle that parties cannot by agreement oust the courts of their jurisdiction: *Insurance Co. v. Morse*, 20 Wall. 445; *Scott v. Avery*, 5 H. L. Cas. 811. And a custom that a party having a claim due upon contract may not pursue the usual remedies provided by law is not valid: See *Spears v. Ward*, 48 Ind. 541; *Manson v. Grand Lodge etc.*, 30 Minn. 509. It is, however, held that mutual benefit societies may provide by by-laws for redressing grievances and deciding controversies, and may compel members to resort to the prescribed methods of procedure before invoking the power of the courts: *Bauer v. Samson Lodge, Knights of Pythas*, 102 Ind. 262; S. C., 13 Am. & Eng. Corp. Cas. 618; *Poultney v. Bachman*, 31 Hun, 49; *Harrington v. Workmen's Ben. Ass'n*, 70 Ga. 340; and see *White v. Brownell*, 2 Daly, 329; *Lafond v. Deems*, 81 N. Y. 508. And some of the cases go to the extent of holding that the society may prohibit actions at law altogether, and make its own decisions conclusive: *Anacosta Tribe etc. v. Murbach*, 18 Md. 91; S. C., 71 Am. Dec. 625; *Osceola Tribe etc. v. Schmidt*, 57 Md. 98; *Foran v. Howard Ben. Ass'n*, 4 Pa. St. 510; *Black and White Smith's Soc. v. Vandyke*, 2 Whart.

309; S. C., 30 Am. Dec. 263. A member of the Order of Chosen Friends is not bound, as the holder of a relief fund certificate, to exhaust his remedies in the courts of the order before resorting to a court of law, and the order cannot, by provisions in its by-laws, deprive him of the right to resort to a court of law: *Supreme Council etc. v. Garrigus*, 104 Ind. 133. If the by-laws of the society make no provision for a tribunal to decide questions arising between the society and its members, and a member is injured by the failure of the society to fulfill its contract to pay benefits, he may maintain an action at law against it: *Dolan v. Court Good Samaritan*, 128 Mass. 437. A by-law of an insurance company, providing that any suit on a policy should be brought in a certain county, is not binding on the assured: *Nute v. Hamilton etc. Ins. Co.*, 6 Gray, 174; though it is held to be otherwise as it respects a by-law limiting the time within which suit must be brought: *Amesbury v. Bowditch etc. Ins. Co.*, 6 Id. 596; and see *Wilson v. Aetna Ins. Co.*, 27 Vt. 99; *Cray v. Hartford Fire Ins. Co.*, 1 Blatchf. 280.

An arbitration clause in the constitution of an unincorporated association is held to have only the same force and effect as a private agreement to submit any controversy, and like such an agreement is revocable: *Heath v. New York Gold Exchange*, 7 Abb. Pr., N. S., 251; S. C., 38 How. Pr. 168; and see *Savannah Cotton Exchange*, 54 Ga. 668.

6. *Construction of By-laws, Notices, etc.* — In construing by-laws, the courts will interpret them reasonably, if possible, not scrutinizing their terms for the purpose of making them void, nor holding them invalid if every particular reason for them does not appear: *Poulkers' Co. v. Phillips*, 6 Bing. N. C. 314; *Hibernia Fire Engine Co. v. Harrison*, 93 Pa. St. 264. No question being made that the by-law is unreasonable, against law, or contrary to public policy, the court must construe and give effect to it in the same manner and upon the same principles that it would construe and give effect to an agreement in writing, made and entered into between private individuals: *State v. Conklin*, 34 Wis. 1, 30; *Re Dunkerson*, 4 Biss. 227. And a by-law of a voluntary unincorporated association cannot be held by the courts to be invalid merely because it is not reasonable, if it has been adopted in the way agreed upon by the members of the association. The court has no power to pass upon the question as to whether the rules and regulations adopted by the association for the guidance of its own affairs are reasonable or unreasonable: *Kehlenbeck v. Logeman*, 10 Daly, 447.

It is in general fair to presume that a member of a corporation has notice of its by-laws, without direct proof of notice: See *Buffalo v. Webster*, 10 Wend. 99; *Inhabitants etc. v. Morton*, 25 Mo. 593. And one who becomes a member of a mutual insurance company, or mutual benefit society, is clearly chargeable with knowledge of its laws and rules. By-laws, not in themselves illegal nor requiring the performance of acts contrary to law, must therefore be deemed binding upon all persons who become members of such an organization: *Bauer v. Samson Lodge, Knights of Pythias*, 102 Ind. 282; S. C., 13 Am. & Eng. Corp. Cas. 618; *Presbyterian Mut. Assurance Fund v. Allen*, 106 Ind. 593; *Mitchell v. Lycoming Mut. Ins. Co.*, 51 Pa. St. 402; *Stineral v. Dubuque etc. Ins. Co.*, 18 Iowa, 319; *Coles v. Iowa State Mut. Ins. Co.*, 18 Id. 425.

In pleading, the legal effect of a by-law may be set out, without reciting its exact language, and the by-law itself may be introduced in evidence under such a pleading: *Kehlenbeck v. Logeman*, 10 Daly, 448.

BLAND v. ADAMS EXPRESS COMPANY.

[1 DUVALL, 222.]

COMMON CARRIERS ARE HELD BY LAW TO PECULIAR RESPONSIBILITY, admitting no excuse for the loss of goods, except an act of God, or of a public enemy, which could not have been averted.

MORGAN AND HIS BAND OF CONFEDERATES CONSTITUTED, IN MAY, 1862, PUBLIC ENEMIES, in the technical sense, and the defendant was not liable for a package of money taken by them from a railroad train.

ACTION against a common carrier for failure to deliver a package of money, according to assignment. Appeal by plaintiff from a judgment dismissing his petition. The opinion states the case.

J. W. Barr, for the appellant.

G. A. and I. Caldwell, for the appellees.

By Court, ROBERTSON, J. To a petition by Arthur Bland against the "Adams Express Company," charging the non-delivery, according to consignment, of a package containing \$2,279, confided by him at the city of Louisville on the tenth day of May, 1862, to said company, as a common carrier, to carry from said city to his consignee at the city of Nashville, it filed an answer alleging that its agent forthwith placed the said package with all its said contents in its iron safe on the railroad train then departing from Louisville to Nashville; that, on the same day, John Morgan and his band of confederate soldiers, on the way, near Cave City, attacked the train, burned most of the cars, and by irresistible armed force, robbed the safe of the said package and all its contents; and that no portion of the money so abstracted had been rescued or restored. These facts having been sufficiently proved, the circuit judge, to whom the law and the facts were submitted, dismissed the petition. And this appeal seeks the reversal of that judgment.

Public policy, and consequently the law, holds common carriers to a peculiar responsibility, extremely stringent, admitting no excuse for the loss of goods except an act of God or of a public enemy, which could not, by any proper care or available force, have been overcome or averted. No other human force than that of a public enemy will exonerate the carrier, because, otherwise, he might fraudulently muster or combine with a force to rob himself.

The only question in this case is, Was Morgan's band, in the technical sense, a public enemy? And the answer depends

on whether the strife in which they were fighting is a civil war. War is either international or civil, foreign or domestic. Insurrection, however violent or formidable, is not war. Civil war is preceded by insurrection, which becomes magnified and matured into war in the legitimate sense. And when so characterized, the parties are belligerents, and respectively entitled to belligerent rights. The American Revolution of 1876 commenced in insurrection. But the insurgent colonies soon became belligerent states. By the Declaration of Independence, civil war was inaugurated, as often and authoritatively recognized and adjudged. After that transforming event, the American resistance was rebellion no longer, but war for liberty. The struggle in which the United States are now engaged against the seceding states is more stupendous and quite as eventful. It is to save that which the war of independence achieved. And history records no civil war more flagrant or gigantic than that in which our country is now engaged. If this be not war, what is war, and when or where did it ever rage and desolate and destroy? It has been so treated at home and abroad,—by our own government in all its departments, as well as by foreign governments,—and if it be war now, it was as certainly war, and as much war, on the 10th of May, 1862.

Wherefore the judgment is affirmed.

RULE THAT COMMON CARRIERS ARE ANSWERABLE for all losses not occasioned by the act of God or the public enemies, is founded in justice and sound policy, and should not be departed from: *Arnold v. Jones*, 82 Am. Dec. 617.

NOTHING WILL RELIEVE COMMON CARRIER FROM LIABILITY FOR LOSS except the act of God or of public enemies, or that which arises from some event expressly stipulated against: *Fergusson v. Brent*, 71 Am. Dec. 582.

ACT OF GOD DEFINED, and what is or is not such: *Fergusson v. Brent*, 71 Am. Dec. 582, and cases collected in note 587; *Hays v. Kennedy*, 80 Id. 627; *Friend v. Woods*, 52 Id. 119.

CITY OF LOUISVILLE v. COMMONWEALTH.

[1 DUVALL, 295.]

GENERAL LAW CONCERNING PERSONS MAY INCLUDE ARTIFICIAL as well as natural persons, and every corporation is a legal person.

PRIVATE CORPORATION, LIKE BANK OR RAILROAD COMPANY, IS, IN TECHNICAL SENSE, PERSONAL; but a municipal corporation, like a state, county, or city, while nominally a person, is virtually a political power.

TAX LAW OF KENTUCKY APPLIES TO PERSONS ONLY, and not to political bodies exercising in different degrees the sovereignty of the state.

EXPRESS EXCEPTIONS SPECIFIED IN TAX LAW OF KENTUCKY DO NOT IMPLY that no property not excepted shall be exempt, or that municipal property, used for public purposes of local government, was intended to be subject to taxation. Property owned and used by city of Louisville, in its social or commercial capacity, as a private corporation, and for its own profit, such as vacant lots, market-houses, fire-engines, etc., is subject to taxation, but property dedicated to charity is not.

PROVISIONS OF KENTUCKY STATUTE LAW DEFINING PROPERTY SUBJECT TO and exempt from taxation, where embodied.

MOTION to correct assessment. The opinion states the case.

W. S. Bodley and W. Mix, for the appellant.

John M. Harlan, attorney-general, for the commonwealth.

By Court, **ROBERTSON, J.** The various articles of property owned by the city of Louisville as a corporation having been assessed for state revenue for the year 1863, at the aggregate valuation of six hundred and sixty-four thousand dollars, the city moved the county judge of Jefferson to correct the assessment, by exempting all the property as municipal, and therefore claimed to be not liable to state taxation, or by reducing the reported valuation on such property as should be adjudged liable. The court excepted "the city hall" only, and made a small reduction in the valuation of all other property as assessed. The city, by this appeal, seeks a reversal of that judgment, and we now adjudge that the county judge erred in not making the exemption more comprehensive, and also in not reducing to a greater extent the valuation of property liable to taxation.

The only statutory law on this subject is embodied in the second volume of Stanton's Revised Statutes, art. 5, secs. 1-3, pp. 248-250. Section 1 prescribes the form of the assessor's list, including all the articles to be assessed; and the second and third sections contain the following provisions:—

"Section 2. All estate, real and personal, and all interest in such estate, named and specified in the tax-book aforesaid, shall be assessed for taxation, and the tax paid by the owner or possessor thereof to the person authorized by law to receive the same.

"Section 3. Houses of public worship and land held under the laws of this state by any denomination of Christians or professors of religion for devotional purposes, to the extent of five acres, and the land upon which any seminary of learning is erected, to the extent of five acres, held fiducially or indi-

vidually; and custom-house, post-office building, court-room, or other necessary offices or hospitals built or owned by the United States, including the lots of ground on which they are erected, and all libraries, philosophical apparatus owned by any seminary of learning, and all church furniture and books for the objects and uses of religious worship, shall be exempt from taxation, and may not be listed by the assessor."

Whether these enactments include municipal property as subject to taxation, is the first and principal question to be considered. A general law concerning persons may include artificial as well as natural persons; and every corporation is a legal person. Even the United States, and each separate state, and every county in each state, are *quasi* corporations, and each of all such corporations is, in law, a person. And consequently a tax on the real estate of all persons would, without qualification or exception, literally include that of every corporation, municipal as well as private. But in this respect there is an obvious and essential distinction between municipal and private corporations. A private corporation, like a bank, or railroad, or turnpike company, is, in the technical sense, altogether personal. But a municipal corporation, like a state, or county, or the city of Louisville, is much more than a person. While nominally a person, it is vitally a political power; and each, in its prescribed sphere, is *imperium in imperio*. All are constituent elements of one total sovereignty. The city of Louisville, to the extent of the jurisdiction delegated to it by its charter, is but an effluence from the sovereignty of Kentucky, governs for Kentucky, and its authorized legislation and local administration of law are legislation and administration by Kentucky, through the agency of that municipality. The tax law of Kentucky constructively applies to persons only, and not at all to political bodies exercising in different degrees the sovereignty of the state. Were this not true, then—the statute literally embracing all persons, and the state being, in one sense, a person—her capital and penitentiary and other public property would, like the estate of a natural person, be subject to assessment for taxation; and so, too, would the court-houses and jails and poor-houses of all the counties in the state. But neither the state nor a county has ever been considered a person contemplated by any tax law ever enacted. And does not the only reason for their constructive exclusion equally exempt the municipal property of Louisville, used for the con-

venience and facility of its local government? We think so, and, without elaborate argument, we so adjudge.

The exceptions specified in the statute, as herein quoted, do not imply that municipal property used for public purposes of local government was intended by the legislature to be subject to taxation. These exceptions exonerate private property, such as churches and school-houses, which might otherwise have been constructively subject; and property of the United States, such as custom-house, etc., which, being protected by the laws of Kentucky, would certainly be subject to her taxing power, and might have been held as subjected by the statute, had it not as an act of comity or policy expressly exempted it. These express exemptions therefore do not imply that no property not thus excepted shall be exempt. To assume the converse would involve the absurdity of taxing the public property of the state and the counties. But no jurist could have ever apprehended such an assumption; and therefore the legislature was not guilty of the folly of expressly exempting that which no rational construction could have made subject to the tax law. And if, notwithstanding the specified exceptions, the public property of the state and counties is exempt, the same reason exempts the public property of Louisville used for carrying on its municipal government. But so far as any of its property may be used, not for that purpose, but only for the convenience or profit of its citizens individually or collectively, this it owns and uses as a private corporation, and like the property of all such corporations not expressly exempted, it is a legal subject of assessment for taxation. The more precise and distinctive test for classification is this: whatever property, such as court-house, prison, and the like, which became necessary or useful to the administration of the municipal government, and is devoted to that use, is exempt from state taxation; but whatever is not so used, but is owned and used by Louisville in its social or commercial capacity as a private corporation, and for its own profit, such as vacant lots, market-houses, fire-engines, and the like, is subject to taxation. If, however, as just indicated, the property owned by the city as a private corporation is not used for profit to the city, but is dedicated to charity, it is not constructively subject to taxation under any existing law. In England it has been adjudged that a corporation owning land and using it for its own profit is constructively embraced by a statute of 42 Eliz., c. 2, imposing a poor-rate duty on "inhabi-

tants and occupiers": *Blandford v. Foot*, Cowp. 73. This implies that, had the land been devoted to charity or other public use, the corporate owner would not have been deemed liable under the statute.

The true principle of taxation is equality of contribution according to means. A charity is no part of the means of the donor, or of the mere custodian of the barren title. It is of no pecuniary profit or appreciable value to the nominal owner. It is not, therefore, a fit subject for taxation. And consequently, although the legislature has the power to tax it, yet no general statute for taxing the property of all persons will be interpreted as embracing property dedicated to public use or mere benevolence. In this category are included hospitals, alms-houses, and school-houses.

The county judge will have no difficulty in applying the foregoing principles and tests to this case on its return to his court. He will easily see what property is used in subservience to the municipal government, what to charity, and what to the profit and convenience of the citizens in the capacity of a private corporation. Much the larger portion of the property as assessed, including wharves, engine-houses, and other articles not used or needed for governmental purposes, are not entitled to exoneration. And as to these, the proof entitled the city to a much larger reduction in the assessed value than the county judge made. On this subject the testimony of Kaye ought to outweigh the unverified estimate of the city auditor.

On the return of the case, further testimony may be heard on both sides, for fixing the proper value.

For the foregoing reasons the judgment is reversed, and the cause remanded for further proceedings and judgment conformable with this opinion.

CORPORATIONS ARE IN LAW, FOR CIVIL PURPOSES, DEEMED PERSONS: *Railroad Company v. Gallahue*, 65 Am. Dec. 254, and note 263.

PERSONS IN SAME CLASS, AND PROPERTY OF SAME KIND, must generally be subjected to the same burden, in Kentucky, to constitute taxation: *Lexington v. McQuillan*, 35 Am. Dec. 159.

EXEMPTION OF PROPERTY FROM TAXATION: See *State v. Bank of Smyrna*, 73 Am. Dec. 699, and cases collected in note 707; *Mott v. Pennsylvania R. R. Co.*, 72 Id. 664, and note 680.

BIESENTHALL v. WILLIAMS.

[1 DUVAL, 329.]

PROOF OF LAWS OF SISTER STATE BY PAROL TESTIMONY OF RESPECTABLE LAWYERS, who incorporate in their depositions sworn copies from the printed volume of those laws, is sufficient, independently of any statutory regulation.

LAW OF OHIO AUTHORIZING PERSONAL JUDGMENT AGAINST DEFENDANT upon whom process had been served by a copy left at his dwelling, when he had absented himself to avoid process, cannot be held invalid in Kentucky as between citizens of the former state. The jurisdiction of the former court being established, the judgment must be received as *prima facie* evidence, at least, that all its mandates were in accordance with the law, and binding on the parties until legally impeached or reversed.

INLAND BILL OF EXCHANGE, WHAT IS.—Instrument in following words: "Cincinnati, September 18, 1855. Thomas Williams, Esq.: Please let the bearer have fifty dollars. I will arrange it with you this noon. Yours, most obedient, S. R. Biesenthall,"—is an inland bill of exchange, and not a covenant, and is barred by the five years' limitation.

ACTION and recovery on inland bill of exchange. The opinion states the case.

J. Roberts, for the appellant.

J. G. Wilson, for the appellee.

By Court, WILLIAMS, J. The laws of Ohio introduced as evidence in this case were not only established by the parol evidence of two respectable lawyers, but sworn copies from the printed volume of the laws of the state, published by its authority, were also incorporated as part of their depositions. But it is insisted that this does not sufficiently establish the law of Ohio by any recognized rule in this state.

By section 25, chapter 35, 1 Stanton's Revised Statutes, 470, "The printed laws of the United States, or of any state or territory thereof, which have been or shall be received in the secretary's office of this state, and which shall have been printed under the authority of the United States, or such state or territory, or a copy thereof, when duly certified by the secretary of state for this commonwealth, shall be admitted and received as evidence of such laws."

This was but the enactment, substantially, of the previous statute of 1809: 1 M. & B. Stat. 187. The subsequent act, approved March 10, 1856 (1 Stanton's R. S. 470, 471), extends the rule so far as to make such printed volumes and pamphlets *prima facie* evidence, without having first been lodged in the secretary's office. But neither of these statutes repeals the

common-law mode, but are cumulative both as to it and the act of Congress.

In *Chamberlain v. Maitland*, 5 B. Mon. 448, this court held that the evidence of the notary public was sufficient to establish that there is annually a day of fasting in Massachusetts, and that the banks and all other places of business are closed on such days; also, that a copy, proved by him to be an extract from the legislative act of said state, authorizing the protest of a bill of exchange the day previous, when it falls due on such fast day, must be taken as sufficient evidence of the law of that state. After reciting the act of 1809, the court said: "It seems to us such book cannot be entitled to greater credence than the sworn extract before us."

In *Baron de Bode v. Regina*, 10 Jur. 217, it was held, upon great consideration, by the English court, that a foreign written law may be proved by the parol evidence of a witness learned in the law, without first attempting to obtain a copy of the law itself, because, as the court said, it was regarded as being within that general rule admitting the opinion of skillful and scientific persons on subjects with which they were conversant: See 1 Greenl. Ev., sec. 487, note 2.

The connection, intercourse, and constitutional ties which bind the states of the American Union together, require some relaxation in the stringency of the common-law mode of authenticating or proving foreign laws; and that a printed volume, purporting on its face to contain the laws of a sister state, should be received as *prima facie* evidence of the statute laws of such state, independent of any statutory regulation: 1 Greenl. Ev., sec. 489, and authorities recited.

Whether tested by common-law rules or statutory regulations, the Ohio law must be deemed sufficiently established in this case. This law authorized the court, on a return of the officer that the defendant was served with process by leaving a true copy at his dwelling-house, when he had absented himself to avoid process, and on the attachment of his property, to render a personal judgment, or otherwise making this actual service of process.

All the necessary preliminary steps, as required by said law, were taken. The defendant was then a resident of Ohio, and the court adjudged personally against him. We are now asked to disregard this adjudication.

The national constitution requires that the same validity be given to this judgment in all other states of the Union as it is

entitled to in Ohio. However null such a judgment rendered on such service against the citizen of another state might be, because the legislative enactment of Ohio could not operate extraterritorial, yet as to her own citizens the question is far different.

The right of each state to prescribe the manner and by what legal remedies its own citizens shall seek redress of their wrongs, is sovereign and unlimited, save by that clause of the national constitution prohibiting the states from passing laws which may impair the obligation of contracts. The legislature of this state, and perhaps of all the states of the Union, have provided for the rendition of personal judgments without personal service of process in some special class of cases. A personal judgment may be rendered in behalf of the commonwealth on a recognizance upon the return of two notices, and a personal judgment may be rendered in behalf of a private person, in all that class of cases wherein judgment on motion is authorized by law, upon notice executed by leaving a true copy at the defendant's usual place of abode, with a white member of his family over sixteen years of age, residing with him, when the defendant is absent.

The power to enact these laws, and to render judgment accordingly, has been so long acquiesced in without remonstrance or resistance by the entire profession and people of our state, as to indicate their universal assent to its constitutional existence. This court seemingly approved its existence in *Williams v. Preston*, 8 J. J. Marsh. 602 [20 Am. Dec. 179]. And in *Scott v. Coleman*, 5 Litt. 350 [15 Am. Dec. 71], it held that whilst the general principle of the common law is, that process must be executed, else the judgment would be invalid, yet to this rule there were many exceptions by statutory or local regulations; and as the different state governments "may and do institute such proceedings, it is competent for them to make judgments rendered therein conditionally binding or conclusively final or incontestible." The effect, however, to be given such judgments in Ohio was not proved further than is to be inferred from the judgment and the presumption to be indulged by law.

In the case recited, *Scott v. Coleman*, 5 Litt. 350 [15 Am. Dec. 71], it said, after referring to the provision found in the national constitution, before alluded to herein, "we therefore conceive the general rule to be, that when the judgment of a sister state is produced, rendered by one of its tribunals,

we must presume that tribunal had jurisdiction and authority, and that the act done in pursuance of that authority concludes and binds the parties named therein; and as to impeaching its full credit, the *onus probandi* lies on him who resists it."

The jurisdiction of the Ohio court is shown by the laws of that state. We must, then, receive the judgment of the court as at least *prima facie*, if not conclusive, evidence of the law; and that all of its mandates were in accordance therewith, and conclusive and binding on the parties until legally impeached, else reversed by a superior tribunal of that state.

There was no error in admitting the evidence as to the laws of that state, nor in admitting the record, proceedings, and judgment.

A recovery was also had upon the following writing:—

"CINCINNATI, September 18, 1855.

"THOMAS WILLIAMS, Esq.:

"Please let the bearer have fifty dollars. I will arrange it with you this noon.

Yours, most obedient,

"S. R. BIESENTHALL."

To this cause of action the defendant pleaded the statute of limitation, and insists that five years bars it. The plaintiff insists that it is not "a bill of exchange, draft, or order," but a covenant that cannot be barred under fifteen years.

Disregarding what the pleadings may style it, we look to the paper to ascertain its legal character. "A bill of exchange is defined to be an open letter of request from and order by one person on another, to pay a sum of money therein mentioned to a third person": 1 Bouv. Law Dict. 176.

"It is usual, when the drawer of the bill is debtor to the drawee, to insert in the bill these words: 'And put it to my account'; but where the drawee, or the person to whom it is directed, is debtor to the drawer, then he inserts these words: 'And put it to your account'; but it is altogether unnecessary to insert any of these words": Id. 177, 178.

Here was an open letter written by Biesenthall requesting Williams to let a third party, "the bearer," have fifty dollars; but it is said that the words "I will arrange it with you this noon," contained in it, make a covenant, and changes the legal character of the instrument. This paper, when delivered by Biesenthall to "the bearer," and before it was presented to Williams for his sanction or rejection, and when he had not assented to it, nor was bound by it, still had a legal existence, with its legal obligations and legal character, and

upon which the bearer could recover his legal rights. What was it? It was then clearly not a covenant between Williams and Biesenthall, for Williams had never seen it, nor had in any manner assented to it. These words quoted were not a covenant with the bearer, because they were addressed to Williams, and an assurance to him that if he lent the fifty dollars to the bearer, the money should be repaid him the same day. At the time Biesenthall delivered it to the bearer, it was neither a covenant with Williams nor the bearer; and we apprehend these words were of no more legal significance than had he said "and put it to my account," or "charge me," or "I will pay you," and, we presume, were inserted for the mere purpose of assuring the drawee, Williams, that he should not be delayed in the repayment of the money.

The paper being an inland bill of exchange without these words, they did not change its character nor destroy any of its qualities.

In *Early v. McCart*, 2 Dana, 415, Early, as indorsee, declared on this writing: "Pay to Alexander and Stockton, or order, \$215, and I will credit your note to me for that amount due on the 25th inst., value received. August 24, 1833.

"ROBERT MCCART.

"To Mr. JOHN ANDREWS, SHERBURN MILLS."

This court held the latter words did not change the character or qualities of the writing, but that it was an inland bill of exchange, upon which the indorsee could maintain a suit against the drawer. The promise contained, that the drawer would credit the note of drawee, which he then held, for the same amount, was not the designation of a particular fund, alone, out of which it should be paid.

This paper, then, being a domestic bill of exchange, canceled by its being taken up by the drawee, falls within the operation of section 2, article 3, chapter 63, 2 Stanton's Revised Statutes, 127,—five years, and not fifteen, being the statutory bar to this character of written instruments. It may be, however, that legal reasons exist why the statute did not begin to run five years previous to the bringing this suit; and this question we leave open for further adjudication.

The letter from Williams to Biesenthall was proved to be in Williams's handwriting, and although without date, its statements seem to be pertinent to the issue raised on the answer and cross-suit of Biesenthall, and should, therefore, have been permitted to go to the jury for their consideration and deter-

mination whether applicable to the facts in issue; no reason for its rejection has been suggested by counsel; none has been perceived by the court.

For the errors stated, the judgment is reversed, with directions for a new trial, and further proceedings not inconsistent herewith.

ROBERTSON, J., did not concur in so much of this opinion as decides that the express stipulation to drawee, in the event of his acceptance, was not a covenant.

FOREIGN LAWS MUST BE PROVED AS FACTS, and will not be judicially noticed: *Byford v. Holliman*, 60 Am. Dec. 223; *Pelton v. Plainer*, 42 Id. 197; *Brinhall v. Van Campen*, 82 Id. 118; *Sawyer v. Eastern Steamboat Co.*, 74 Id. 463.

FOREIGN LAW, HOW PROVED: *Owen v. Boyle*, 32 Am. Dec. 143, and note 148; *Phillips v. Gregg*, 36 Id. 158; *Clarke v. Bank of Mississippi*, 52 Id. 248; *People v. Lambert*, 72 Id. 49; *Smith v. Potter*, 65 Id. 198, and note 200; *Stanford v. Pruet*, 73 Id. 734; *Latterett v. Cook*, 63 Id. 428; *Emery v. Berry*, 61 Id. 622.

BILL OF EXCHANGE, WHEN FOREIGN AND WHEN INLAND: *Chenoweth v. Chamberlin*, 43 Am. Dec. 145, and note 147; *Northern Bank v. Squires*, 58 Id. 682; *Schneider v. Cochrane*, 61 Id. 204.

THE PRINCIPAL CASE IS REFERRED TO as sustaining a judgment of the court of a sister state, because its jurisdiction was shown by the laws of that state, in *Kerr v. Condy*, 9 Bush, 378.

BUCKNER v. BUSH.

[1 DUVALL, 304.]

PREMATURE JUDGMENT ON CONSTRUCTIVE SERVICE OF PROCESS IS CLERICAL MISFEIGN, and cannot be reversed until the circuit court has refused on motion to correct it.

DECISION, THOUGH ERRONEOUS, CANNOT BE REVERSED, unless prejudicial to the appellant.

NOTES EXHIBITED WITH PETITION AGAINST DEFENDANTS CONSTRUCTIVELY SUMMONED, ARE PRIMA FACIE GENUINE, and require no other proof *abunde* of their genuineness.

PRESUMPTION EXISTS THAT SHERIFF DISCHARGED HIS OFFICIAL DUTY, by first serving attachments that issued on the petition first served.

ALLEGATION THAT DEBTOR HAD BEEN MORE THAN THIRTY DAYS VOLUNTARILY WITHIN CONFEDERATE LINES may be taken for confessed, if supported by the proper affidavit.

APPEAL from Clarke circuit court. Contest between attaching creditors on constructive notice. The opinion states the case.

Harlan and Harlan, for the appellants.

Simpson and Scott, for the appellees.

By Court, ROBERTSON, J. This is a contest between several attaching creditors on constructive service. The proceeds of the attached property sold under an order of sale made at the May term, 1862, being insufficient to pay more than two of the creditors (William J. Bush and William Buckner), the circuit court adjudged distribution *pro rata* among them and one other party (J. E. and L. Gordon).

To reverse that judgment, the common debtor, Zachariah E. Bush, and two of his other attaching creditors, prosecute this appeal, and urge several objections to the judgment in the following order:

1. That the order at the May term, for a sale for the exclusive benefit of the appellees, was premature and unauthorized as to Gordons, and even also as to his co-appellees, because, on the petition of the Gordons, there had been no warning order, and the warning order on the petition of his co-appellees was for an appearance at the July term, 1862.

The prescribed distribution was, during the same May term, suspended by the court, and was not made final until the November term, 1862. But if there was any error in prematurely rendering any judgment at the May term, it is not available in this court. The 578th section of the code declares that premature judgments shall be deemed clerical misprisions only. And the 577th section provides that a clerical misprision shall not be revisable by this court until the circuit court has refused, on motion, to correct it. There having been no such motion or refusal in this case, we cannot take cognizance of the alleged error.

2. That there never having been any warning order on the petition of the Gordons, the judgment for distribution was, as to them at least, unauthorized and erroneous; and this is true. But as the fund will not quite pay the debts of their co-appellees, the error appears to be prejudicial to them only, and not to any of the appellants.

3. That it was erroneous to adjudge that the notes exhibited in the petition of the appellees, Bush and Buckner, were genuine without proof *aliunde* of their genuineness, because the petitions contained no allegation which, under the code, would allow the court to take anything for confessed on merely constructive notice. The practical construction by this court

does not, in such a case of exhibits *prima facie* genuine and right, require any other proof of them.

4. That there was no ground for adjudging priority to any of the appellees. The answer to this objection is: 1. That their petitions being filed first, the presumption is, that the sheriff discharged his official duty in serving them first; and 2. The petitions of all the other creditors alleged as the only ground for their attachments, absence of their debtor from the state for four months; and there was neither any proof of that allegation, nor affidavit allowing the court to take it for confessed. And an amended petition by the appellees alleged that the debtor had been more than thirty days voluntarily within the Confederate lines, and an affidavit was made which allowed that allegation to be taken for confessed. And, as decided by this court at the present term in the case of *Dunn v. Salter*, 1 Duvall, 342, this alone entitled the appellees to priority.

Wherefore, perceiving no available error in the judgment, it is affirmed.

KEMPER v. KEMPER.

[1 DUVALL, 401.]

DECEASED MORRIS CAURA IS PERFECTED AND VALID, where a father in his last illness, and in contemplation of death, which ensued in a few days, executed a writing, giving specified portions of his estate to certain children and grandchildren, and delivered the writing to two sons, whom he charged with the execution of the trust, and to whom he also delivered the property so given.

ACTION by one Steel, as administrator, to compel the surrender to him of the personal estate of his intestate, Kemper. Judgment was rendered in favor of the administrator, and defendants appealed. The opinion fully states the case.

G. W. Craddock, for the appellants.

T. N. Lindsey, for the appellee.

By Court, **PETERS, J.** This action was brought in the court below by Steel, as the administrator of Benjamin J. Kemper, deceased, against appellants, to compel them to surrender to him the personal estate, which he alleges belonged to said decedent at his death, and which they wrongfully withhold from him.

Appellants resist his right to recover, upon the ground that

decedent, before his death, disposed of the whole of his personality, and having divested himself of his entire estate during his life, he left nothing to be administered, or to which appellee, as his personal representative, was entitled. Upon final hearing, judgment was rendered in favor of the administrator, from which this appeal is prosecuted.

It appears from the evidence, that on the 8th of December, 1859, decedent executed a writing, attested by two subscribing witnesses, in which the names of such of his children and grandchildren are written, to whom he gave his estate, consisting principally in money and cash notes, with the amount each one was to have set opposite his or her name, and delivered the paper to his two sons, Joel and Benjamin, to keep, and charged them with the execution of the trust.

The important and decisive question in this controversy is, Was this a donation *mortis causa*?

It is established by the testimony that at the time the paper was executed the decedent was in the full enjoyment of all his mental faculties, and free from all improper and undue influences from any one; so that what was done was the voluntary act of a mind entirely competent to its performance. And it is also proved that it transpired in his last illness in contemplation of death, which ensued in a few days.

The rule of law is, that unless there be a delivery of the thing intended to be given, there cannot be a perfection of a donation *mortis causa*; consequently, whatever is incapable of being delivered cannot be the subject of such a donation; but it will be sufficient if the delivery be made to a third person, in trust for the donee, and in such a manner as the thing to be delivered is susceptible of: *Minchin v. Merrill*, 2 Edw. Ch. 333.

In *Turpin v. Thompson*, 2 Met. (Ky.) 420, this court held that a promissory note was the subject of a gift *causa mortis*, without an assignment thereon from the donor to the donee, and the beneficial interest therein would pass by delivery; and under the civil code, the holder being the beneficial owner, not only may, but must, sue thereon in his own name.

It is further said in the opinion, *supra*, upon the authority of 2 Kent's Com., side page 447: "In this country promissory notes and other choses in action are all considered proper subjects of a valid donation *causa mortis*"; and other authorities are cited sustaining the doctrine.

The only remaining question is, whether the donation was, in this case, consummated by a delivery.

The witnesses who were present when decedent executed the writing relied upon by appellants—and there were several of them—prove he delivered it to his sons Joel and Benjamin, with directions respecting it, and to some of them he, in substance, said he had placed his property in their hands, directed them to collect the money on the notes, and pay it out according to his expressed purpose; and he had confidence in them that they would do right.

It is shown by appellee's own pleadings that they had the effects in their possession, and it is difficult to resist the conclusion that they were delivered over to them by their father in his lifetime, to be held by them in trust for the beneficiaries designated; and as there is no proof, or even allegation, that they were not executing faithfully the trust confided to them, no sufficient reason is perceived for disturbing them, and taking from their control that which had been confided to them by the owner, and placing it under the control, *sub modo*, of one who had no personal interest in the estate.

Wherefore the judgment is reversed, and the cause remanded, with directions to dismiss appellee's petition.

GIFTS CAUSA MORTIS ARE NOT FAVORED: *Harris v. Clark*, 51 Am. Dec. 352; essentials to validity of: *Id.* 362, note; *Holley v. Adams*, 42 *Id.* 506; *Western v. Hight*, 35 *Id.* 250; *Harris v. Clark*, 51 *Id.* 352; *Borneman v. Siding*, 33 *Id.* 626.

GIFT CAUSA MORTIS OF NOTE PAYABLE TO ORDER: See *Overton v. Sawyer*, 75 Am. Dec. 444; *Weston v. Hight*, 35 *Id.* 250; *Grover v. Grover*, 35 *Id.* 319.

DONOR'S OWN PROMISSORY NOTE CANNOT BE SUBJECT OF VALID DONATED CAUSA MORTIS: *Flinn v. Pattee*, 66 Am. Dec. 742, and note 743.

CASES
IN THE
COURT OF APPEALS
OF
MARYLAND.

BERRY v. HARRIS.

[IN MARYLAND, 82.]

SEPARATE CREDITOR OF INDIVIDUAL SURVIVING PARTNER may attach by way of execution a debt due the partnership, of which that individual was a member, before a settlement of the partnership, and ascertainment of the debtor partner's interests.

ATTACHMENT on judgment. **HARRIS**, the appellee, who was a judgment creditor of one **J. C. Dorsey**, issued an attachment by way of execution, which was placed in the hands of **Berry**, the appellant, as garnishee. He appeared and pleaded *nulla bona*, and thereupon issue was joined. Other facts appear from appellant's prayers stated in the opinion.

Claggett, for the appellant.

Mottier and Miller, for the appellee.

By Court, **BOWIE, C. J.** The appellant's prayers affirm:—

1. That a separate creditor of an individual partner cannot attach by way of execution a debt due to the partnership, of which that individual is a member, for his private debt, unless there has been a settlement of the partnership, and the interests of the debtor partner first ascertained.

2. That this applies to the case of surviving partners as well as of living partners.

3. That only the actual interest of the debtor partner, after final settlement thereof, can be recovered by the attaching creditor.

4. That there was no sufficient evidence in the cause of the

quantum of interest of John C. Dorsey in the partnership assets.

The rights of joint and separate creditors, during the existence of the partnership, differ materially from their rights, after the termination of the firm, and the estate has gone into equity for distribution: *In the Matter of Smith*, 16 Johns. 102, 109; *McCulloh v. Dashiell*, 1 Har. & G. 96 [18 Am. Dec. 271]; 1 Am. Lead. Cas. 472. The notes on these cases show the tendency to confusion in deciding upon the relative rights of the two classes of creditors. It is well remarked: "Some judges and text-writers, by not distinguishing between solvency and insolvency, and between legal and equitable jurisdiction, have molded a system on the subject which, through the departure from principles, is law sacrificed and equity not attained." Justice Cowen, in the case of *Phillips v. Cook*, 24 Wend. 393, 408, has elaborately examined and lucidly defined the limits of the jurisdiction of the courts of law and equity on this subject. Keeping these distinctions steadily in view, we will examine the question before us by the light of authority and reason. In the text of Collyer on Partnership, b. 8, sec. 822, it is said: "By the law of England, the creditor of any one partner may take in execution that partner's interest in all the tangible property of the partnership." The editor, Mr. Perkins, refers, in note 2 to this section, to a number of authorities, English and American, to support this position, extending the doctrine to attachments in those states where attachments on mesne process are allowed, by numerous citations of decisions in several states, upon which he builds this conclusion: "There seems to be no good reason for giving up the process of attachment at law in such cases, as it would probably in this mode be rendered equally as effectual and prompt as any other means of securing the interest of the debtor that might be devised. If a process in chancery should be deemed more effectual, still it might be desirable also to retain a right of attachment at law": See authorities there cited. The subject of execution and attachment there spoken of is tangible property, and the remedy is supposed to be resorted to during the existence of the partnership. The learned editors of the American Leading Cases, in their notes on the cases of *In the Matter of Smith*, 16 Johns. 102, and *McCulloh v. Dashiell*, 1 Har. & G. 96 [18 Am. Dec. 271], remark: "It is necessary, however, to reconcile the various cases, to distinguish between a common-law execution against tangible chat-

tels, such as a *fiery facias*, and a foreign attachment, or proceeding in its nature, against a debt due to a firm, or property belonging to it in the possession of the garnishee. The foreign attachment, or proceeding in the nature of a foreign attachment, against a debt or chose in action, and also against chattels in the possession of a garnishee, by its very nature attaches only upon the separate beneficial interest of the partner in the debt or other subject in the hands of the garnishee, because it is a part of the proceedings to measure and adjudge what is the interest of the partner in the hands of the garnishee. It cannot therefore be maintained, unless it be proved that the partnership is solvent, and be shown what interest the partner has in the firm effects after all debts are paid": Referring to *Fisk v. Herrick*, 6 Mass. 271; *Lyndon v. Gorham*, 1 Gall. 367; *Church v. Knox*, 2 Conn. 514; *Barber v. Hartford Bank*, 9 Id. 407; *Winston v. Ewing*, 1 Ala. 129 [34 Am. Dec. 768]; *Johnson v. King*, 6 Humph. 233. The distinction drawn in these cases is the difference between the common-law process and the foreign attachment, the essential faculty of the latter being to measure the interest of the partner in the chose in action or chattel attached. Proceeding on the hypothesis that there was a continuing partnership, and several interests in the several partners, they determine that in such cases the beneficial interest of the debtor must be ascertained before it is subject to attachment, and in some it is affirmed that this being impracticable at law, no attachment will lie.

These reasons do not apply to a case in which the partnership is terminated by the death of one of the partners. "The surviving partner is entitled to all the choses in action, and other evidences of debt belonging to the firm. They must be collected in his name, and he is entitled to their exclusive custody and control. The right of action, in relation to all partnership demands, is transferred to the surviving partner": *Barney v. Smith*, 4 Har. & J. 485 [7 Am. Dec. 679]; Collyer on Partnership, sec. 666. Although he should expressly declare as surviving partner, he may include in his declaration a count for a debt due to him in his own right: Collyer on Partnership, sec. 674; Gow on Partnership, 132; 5 Term Rep. 498.

Where the action is brought by a surviving partner, the defendant may set off a debt due from the plaintiff as surviving partner against a debt due from himself to the plaintiff in his own right and *e converso*: Collyer on Partnership, sec. 764; *Penniman v. Rodman*, 13 Met. 283. These authorities

show that at law the legal interest in choses in action of a firm is so absolutely transferred by survivorship that they may be merged in one action with choses in action due to the surviving partner, *suo jure*, or extinguished in whole or in part by set-off of claims against him individually.

If this was a case of continuing partnership, we should have much difficulty in distinguishing it on principle from the case of *Fisk v. Herrick*, 6 Mass. 271, *Lyndon v. Gorham*, 1 Gall. 367, and the cases in Alabama and Tennessee; but the case of a surviving partner, invested with the entire legal property and control over the chattel, so broadly marks the line between them that we are not at liberty to disregard the legal claims of the attaching creditor. The case of *Wallace v. Patterson*, 2 Har. & McH. 463, was the case of a domestic creditor against one of several non-resident partners, whose firm, as well as the debtor partner, had become bankrupt. The distinction between attachments against tangible chattels and choses in action belonging to the firm, and attachments issued during the existence of the firm and after its dissolution, was not adverted to, and no opinion was given; we do not regard it, therefore, as decisive of the point to which it was cited. The law having thrown the legal estate upon the surviving partner, we cannot deprive the creditor of the advantage thus attained, upon the presumption of equitable liens on the fund in behalf of other partnership creditors, which may or may not exist. If there are any such, courts of equity are open to them, and capable of giving adequate relief, and the representatives of deceased partners may be protected in the same courts. For these reasons, we think the court below was right in refusing the prayers of the appellant, and the judgment will be affirmed.

Judgment affirmed.

INTEREST IN PARTNERSHIP PROPERTY, liable to the satisfaction of the separate debts of each partner, is the interest of each in the property, after the partnership accounts have been settled, and the demands of the firm creditors provided for: *Winston v. Ewing*, 34 Am. Dec. 768; *Deal v. Bogue*, 57 Id. 702, and note 707; *Willis v. Freeman*, 82 Id. 619, and note 621. The principal case is cited in *Barry v. Fisher*, 8 Abb. Pr., N. S., 379, where it is held that "credits or balances of account due from third persons to a copartner-ship cannot be seized, on an attachment against the property of a copartner, for his individual debt."

SEPARATE CREDITOR OF PARTNERSHIP MAY ATTACH and sell joint property thereof without regard to the equities of the debtors, either separate or joint: *Bardwell v. Perry*, 47 Am. Dec. 687, and note; *Morgan v. Creditors*, 20 Id. 262, and note; *Reed v. Shegarden*, 19 Id. 687, and note; *Hubbard v. Curtis*, 74 Id. 283.

MILES v. BRADFORD.

[22 MARYLAND, 170.]

GOVERNOR OF STATE BEARS SAME RELATION TO STATE that the President does to the United States, and in the discharge of his political duties is entitled to the same immunities, privileges, and exemptions.

GOVERNOR CANNOT BE COMPELLED BY MANDAMUS to perform acts within the exercise of his judgment and discretion.

JUDICIARY HAVE NO CONTROL OR REVISORY POWERS over questions which it is the duty and within the power of the governor of the state to decide, and from which there is no appeal.

THE opinion states the facts.

Alexander and Steele, for the appellant.

Davis and Stockbridge, for the appellee.

By Court, BOWIE, C. J. The peculiar circumstances surrounding this case requiring it should be promptly decided, we have only time to announce the conclusions arrived at, and refer to a few of the leading authorities on which they are based. The case has been argued with an admirable spirit of courtesy and moderation, and much eloquence and learning.

The brief of the relator's counsel states: "The object of the proceedings is to obtain an exposition of the rule of law which ought to guide the discretion of the governor in his ascertainment of the result of the late election had for the adoption or rejection of the new constitution."

The relator's prayer is substantially that the governor of Maryland show cause "why a writ of *mandamus* ought not to be issued, commanding him in ascertaining the number of votes cast at the said late election held as aforesaid," to count certain votes which were tendered and rejected, and to exclude certain votes which shall appear to have been cast at any place other than the election precinct at which the person voting was qualified to vote.

From this brief analysis, it appears the proceeding is one of the most momentous consequence, and should be treated with the greatest deliberation. Our first duty is to inquire whether it is a proper subject for judicial interpretation and interpolation. By our organic law, the powers of government are distributed into legislative, executive, and judicial. We are admonished by the declaration of rights that these powers "ought to be forever separate and distinct from each other,

and no person exercising the functions of one of said departments shall assume or discharge the duties of any other."

The second article of the constitution is, "the executive power of the state shall be vested in a governor. . . . He shall take care that the laws be faithfully executed."

The sixth section of the act of 1864, c. 5, known as the convention law, required the constitution and form of government adopted by the convention to be submitted to the legal and qualified voters of the state for their adoption or rejection, at such time, and in such manner, and subject to such rules and regulations as said convention may prescribe; and the provisions thereinbefore contained for the qualification of voters and the holding of elections, provided in the previous section of the act, were made applicable to the election to be held under that section.

The eighth section further enacts that when the governor shall receive the returns of the number of ballots cast in the state for the adoption or rejection of the constitution submitted by the convention to the people, if upon counting and casting up the returns as made to him as hereinbefore prescribed, it shall appear that a majority of the legal votes cast at said election are in favor of the adoption of the said constitution, he shall issue his proclamation to the people of the state, declaring the fact, and he shall take such steps as shall be required by the said constitution to carry the same into full operation, and to supersede the old constitution of the state.

Is the power and authority conferred on the governor by this act a political or judicial power? A late eminent jurist, whose recent death has been lamented as a national calamity, in the case of *Luther v. Borden*, 7 How. 1, expressed himself thus strongly: "Certainly the question which the plaintiff proposed to raise by the testimony he offered has not heretofore been recognized as a judicial one in any of the state courts. In forming the constitutions of the different states, after the Declaration of Independence, and in the various changes and alterations which have since been made, the political department has always determined whether the proposed constitution or amendment was ratified or not by the people of the state, and the judicial power has followed its decision. Courts of law will not interfere with the exercise of high discretionary powers vested in the chief magistrate of the state, for obvious political reasons; among others, because, as governor of the state, deriving his powers from the

constitution thereof, he has been made a co-ordinate, separate, distinct, and independent department of the government."

In the case of *Lowe v. Towns*, 8 Ga. 372, the supreme court of that state said: "The ultimate effect of this remedy [*mandamus*], in case of refusal by the governor to obey the laws of the land, would be to deprive the people of the state of the head of one of the departments of the government."

Chief Justice Marshall, in the case of *Marbury v. Madison*, 1 Cranch, 145, says, "that the President is invested with certain important political powers, in the exercise of which he is to use his own discretion, and is accountable only to his country in his political character, and to his own conscience."

The chief magistrate or governor of the state bears the same relation to the state that the President does to the United States, and in the discharge of his political duties is entitled to the same immunities, privileges, and exemptions: *Vide Hawkins v. Governor*, 1 Ark. 586 [33 Am. Dec. 346].

Independently of all political considerations, if the question was a purely judicial one, this court could not, consistently with decisions in other states and in our own, grant the prayer of the relator. The general principle laid down in all these, almost without exception, is, that where the acts to be done require the exercise of judgment and discretion in the officer against whom the *mandamus* is prayed, it will be refused: *Vide* cases in *Green v. Purnell*, 12 Md. 329. The result of these decisions is, that the duty and power to decide the questions which we are now asked to determine are devolved upon the officer or governor without appeal, over whom, in that respect, the judiciary have no control or revisory power.

We have thus succinctly announced the general principles which lead us to the adoption of the conclusion that the order of the superior court, in this case, should be affirmed.

The court has been invoked to enter into the constitutional powers of the convention, and express opinions upon the validity of their acts, even if they should hold that the right to issue a *mandamus* did not exist, and they have been referred to the eminent examples of the supreme court through their chief justices in some cases, where they declared the law, although they could not enforce it. Without dwelling on the immense moral, political, and legal influence of that tribunal, to which we cannot pretend, we respectfully suggest there is no parallel between the cases. Those cases in which the supreme court adopted that course, with one notable ex-

ception, were not cases in which society was shaken to its foundations by civil discord, and parties arrayed against each other with intense bitterness. If we cannot subdue the strife, we will not add fuel to the flame. All that we can do is, to show such reverence for constitutional government, by confining ourselves to the strict limits of our authority, as may induce others, who love "liberty regulated by law," to cherish all its muniments, and observe all their obligations.

BARTOL, J., concurred in the ruling of the majority of the court, affirming the order of the court below, but filed the following separate opinion dissenting from certain of their conclusions:—

I assent to that part of the opinion of a majority of the court which denies the *mandamus* asked for on the ground that the duties devolved upon the governor by the act of 1864, c. 5, in ascertaining and announcing the legal votes upon the adoption or rejection of the proposed new constitution, are not purely ministerial in their character; but that they require the exercise of judgment and discretion on his part, necessarily devolving upon him the duty of passing upon and deciding the various questions argued before us, and upon which we have been called upon to pass. In such case the law is well established that a writ of *mandamus* will not be granted: *Green v. Purnell*, 12 Md. 329, and the cases there referred to; and many other cases might be cited.

I do not agree, however, with my brothers in thinking the power that devolves upon the governor, now under consideration, is in any sense a political, executive power, belonging to him *virtute officii*, and not a proper subject for judicial investigation. That subject, however, having been submitted by law to the decision of the governor, I forbear the expression of any opinion upon it.

Order affirmed.

GOVERNOR CANNOT BE COMPELLED BY MANDAMUS to perform a discretionary act: Note to *Hawkins v. Governor*, 33 Am. Dec. 361; *Pacific Railroad v. Governor*, 66 Id. 673; *People v. Bissell*, 68 Id. 591.

EACH DEPARTMENT OF GOVERNMENT within its proper constitutional sphere acts independently of the others; neither can control or dictate to the others: *People v. Bissell*, 68 Am. Dec. 591, and note 596; *De Chastellux v. Fairchild*, 53 Id. 570; *Wright v. Wright's Lessee*, 56 Id. 723.

DOUGLASS v. BOONSBOROUGH TURNPIKE ROAD Co.

[22 MARYLAND, 212.]

WHERE CORPORATION IS EMPOWERED BY STATUTE to establish and build a turnpike, and land is condemned, and compensation made to the then owners of the soil, a subsequent purchaser takes *cum onere*, and the legislature may, by a subsequent act, authorize the corporation to occupy and grade the road, without any new condemnation and compensation to such purchaser. Any compensation which could be claimed in such case would be by the community which had borne the burden of the original condemnation.

GRANT TO PRIVATE CORPORATION MUST BE CONSTRUED STRICTLY, but not so as to defeat the object of the grant; and the laws relating to public highways in Maryland must be given a liberal construction.

BY TRANSFER OF TURNPIKE ROAD FROM PUBLIC to a corporation, the title to the soil is not changed, but remains in the owners of the soil of the adjoining lands, and they have the same use and enjoyment of it that they had before. The easement or right of way is transferred to the corporation, to be held by them while they work and keep the road in repair, subject to the public's right to use it upon paying toll.

DIFFERENCE BETWEEN OCCUPATION OF HIGHWAY by a railroad or a canal and by a turnpike company is, that the occupancy of the former is permanent and exclusive, while the turnpike is considered a public highway, over which every citizen has a right to travel in his own mode of conveyance, and the imposition of tolls is only a method of keeping the road in repair.

WHERE COURT IN DECLARATION CLAIMS CONSEQUENTIAL DAMAGES for injuries to private property from grading a road by a turnpike corporation, and the recovery of such damages is dependant upon facts to be found by the jury, an instruction that if the corporation did acts unnecessary and improper to the grading of the road, then the corporation would be liable, is proper.

The opinion contains the facts.

Alcey, for the appellant.

Weisel and Schley, for the appellee.

By Court, GOLDSBOROUGH, J. The appellees, by the act of 1814, chapter 71, were incorporated, with power to make a turnpike road from Boonsborough to a point on the Potomac River. By the tenth section it provides that "the said road be made on, over, and upon the bed of the present road, as laid out and used." The company was authorized to charge tolls on the road, upon the completion of it. No effort appears to have been made to carry into effect the object of the charter, until after the year 1852. The charter was, however, preserved by successive legislation. By the act of 1852, chapter 266, the appellees were "authorized to occupy, grade, and, if necessary, change the public road leading from Sharpsburg to the

Potomac River, and to exercise over said road all the rights and powers conferred on said corporation by the act of 1814, chapter 71; and to charge tolls" as prescribed by this act. It is conceded that the turnpike road ran through and over the lands of the appellant. The appellee proceeded to occupy and grade the road, and tendered no compensation therefor to the appellant. He thereafter instituted suit against the appellee in 1857, in the circuit court for Washington County, to recover damages for the immediate trespass in occupying and grading the road without his consent; and in the fourth count of his declaration, claimed consequential damages for injuries resulting to his property from the grading of the road, and from other causes set out in this last count. In the first three counts of the plaintiff's declaration, and in the subsequent pleadings applicable thereto, as set out in the record, as also in the first three prayers of the plaintiff and the prayers of the defendant, is involved the important and ruling question, whether the act of 1852 is constitutional, and whether, under that act, the appellee could take legal possession of the highway mentioned in the act, and occupy and grade the same for the purposes of a turnpike road, without being subject to a new condemnation and compensation to the appellant for that portion of the road which passed over and upon his land. The appellant expressly raises the point "that the act of assembly, under which the appellee attempts to justify, is unconstitutional, and no justification could be legally pleaded under its provisions."

It may be properly said, in reference to this main question and the objection of the appellant, that the highway on which the turnpike road is established, having been once condemned and compensation made to the then owners of the soil, that the appellant purchased *cum onere*; and in our opinion the legislature had full power to authorize the appellee to occupy and grade the highway for the purposes of a turnpike road, in which occupation the community alone was interested; and if any compensation could rightfully "be claimed and allowed, it was not by or to the then owner of the soil, but to the community which had borne the burden of the original condemnation. As to the right of the appellee to grade the road, we find sufficient justification in the original acts of assembly, by virtue of which public highways were established. If under these acts the county authorities were allowed to use all necessary materials, such as stone and gravel and earth,

to make the highways subserve the purpose of promoting the public convenience, we think the appellee was not guilty as alleged, if it exercised a similar power under its charter. It would be contrary to the spirit and intention of the original laws creating public highways not to give them a liberal construction; and though a grant to a private corporation is to be construed strictly, yet it is not to be so construed as to defeat the object of the grant. In the case of *Wright v. Carter*, 27 N. J. L. 76, the court says: "By the transfer of the road from the public to a corporation, the title to the soil is not changed, but remains in the owners of the soil of the adjoining lands, and they have the same use and enjoyment of it as they had before; the easement or right of way is transferred to the company, to be held by them while they work the road and keep it in repair, subject to the right of the public to use the road upon paying the tolls established by law." The constitutionality of the act of 1852 is directly supported by the above case, as that question was involved under similar circumstances. The doctrine laid down in *Wright v. Carter*, 27 N. J. L. 76, is analogous in every respect to the case before us, and we do not hesitate to recognize its controlling influence. The cases principally relied on by the appellant, and where judgment on the demurrers was rendered for the plaintiff upon a plea of justification, are cases in which railroads and canals have been established, and a clear distinction is drawn between them and plank or turnpike roads.

In the case of *Craig v. Rochester City and Brighton R. R. Co.*, 89 Barb. 505, the court refer to several cases establishing the above distinction, that the occupation of a highway by a railroad or canal is paramount and exclusive. Whereas in cases of turnpikes, they are regarded as public highways, as every citizen has a right to travel on them in his own mode of conveyance, and the imposition of tolls is a method of keeping them in repair. We are not, however, called on to decide the question raised by the authorities relied on by the appellant, but simply the one before us.

Having decided that the act of 1852 was constitutional, we are of opinion that the appellee's fourth plea was well pleaded, and the circuit court ruled correctly in giving judgment on the plaintiff's demurrers for the defendant. We are further of opinion that the circuit court was right in granting the defendant's prayers, and rejecting the first three prayers of the plaintiff. We have thus far confined ourselves to the consideration

of the appellant's claim for damages under the first three counts of his declaration, and the pleadings and prayers applicable thereto.

The claim for consequential damages set out in the fourth count depended upon facts to be found by the jury; and the appellant's fourth prayer, which was granted by the court, properly announced the law upon the rights of the appellant in this particular. Finding that there is no error in the ruling of the circuit court, either upon the pleadings or prayers, the judgment will be affirmed.

Judgment affirmed.

CHARTER OF CORPORATION MUST BE CONSTRUED against the grantees: *Commonwealth v. Erie etc. R. R. Co.*, 67 Am. Dec. 471, and note 485.

RIGHT TO SOIL OF HIGHWAY RESIDES IN OWNER of the land over which it has been laid: *Lewis v. Jones*, 44 Am. Dec. 138, and note 139; *Brainard v. Clapp*, 57 Id. 74, and note 80; *Holden v. Shattuck*, 80 Id. 684, and note 688.

PARTIES ESTABLISHING HIGHWAY MERELY ACQUIRE RIGHT OF WAY OVER IT, with the incidental right to repair it in a reasonable manner: *Nicholson v. New York etc. R. R. Co.*, 56 Am. Dec. 390.

PUBLIC HAVE EASEMENT ONLY IN LAND TAKEN FOR HIGHWAYS, *Smith v. Stocumb*, 69 Am. Dec. 274, note 276, and every person has a right to their enjoyment: *Davis v. Winslow*, 81 Id. 573; *Stinson v. City of Gardiner*, 66 Id. 281, and note 285.

CHANGE OF PUBLIC HIGHWAY INTO TOLL ROAD imposes no additional burden. Such change is not in the character of the servitude, but in the mode of sustenance. In one case it is sustained by taxes, in the other by tolls: *Carter v. Clark*, 89 Ind. 239, citing the principal case.

IN CONSTRUING CHARTER GRANTED TO TURNPIKE COMPANY, the principal case is quoted in *Baltimore etc. Turnpike Co. v. Routsaha*, 61 Md. 41, that "it would be contrary to the spirit and intention of the original laws creating public highways not to give them a liberal construction; and though a grant to a private corporation is to be construed strictly, yet it is not to be so construed as to defeat the object of the grant."

GUYER v. SMITH.

[22 MARYLAND, 223.]

ILLEGITIMATE CHILDREN WHO ARE ALIENS, born and residing abroad, and taking land in Maryland by devise from their father, a citizen of the United States domiciled abroad, are considered in law as purchasers, and take, not for their own benefit, but for the benefit of the state, and subject to seizure thereby.

WHETHER ALIEN CAN MAINTAIN EJECTMENT for freehold lands in the state of Maryland, *quere*.

ALIEN'S TITLE TO LAND IN MARYLAND is held, not for his own benefit, but for the benefit of the state, and subject to be divested thereby upon an inquest of office found, or other notorious act equivalent thereto.

GRANT OF ESCHHEAT PATENT by commissioners of the land-office of Maryland is a judicial act. The parties in interest having a right to appear, and by their *consent* to contest its issue, with the right to appeal from the decision.

ESCHHEAT PATENT ISSUED BY COMMISSIONER of the land-office of Maryland has the same effect as the ancient proceeding by office found, in divesting the title of an alien to freehold lands in such state.

ILLEGITIMATE CHILDREN UNDER MARYLAND LAW are *nullius filii*, and therefore not entitled to the benefit of the provisions of the act of Congress declaring "that the children of persons who are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States."

THE opinion states the facts.

McKaig, for the appellants.

Miller and Devocmon, for the appellees.

By Court, BARTOL, J. This was an action of ejectment, brought by the appellants against the appellees on the first day of October, 1858, for lot No. 876, containing fifty acres of land. Plea, *non cul.* No questions of location arise in the case. The plaintiff offered in evidence the award of the lot in question, under the act of 1788 (November session), to Thomas Adams, and a deed for the same from Adams to John Guyer, of the city of Annapolis, dated the thirtieth day of March, 1792. They then offered, by consent, evidence taken in the island of St. Bartholomew. From this evidence it appears that John Guyer died in the island of St. Bartholomew on the 18th of March, 1841, leaving a will, by which he devised all the residue of his property, real and personal, and wherever situated, to his two sons, Benjamin V. Guyer and James Guyer (the lessors of the plaintiff), who, as described in the will, "are also the children of Miss Margaret Richardson." The execution of the will was proved by the only witness examined, who also proved that John Guyer had resided in the island of St. Bartholomew for more than forty years, engaged in mercantile pursuits, that the lessors of the plaintiff are natives and citizens of the island, and owe allegiance to his majesty, the king of Sweden and Norway; and that to the best of his belief, their father and mother were not lawfully married, and that their mother is partly of African blood or descent.

The defendants then offered in evidence an escheat patent for this lot (No. 876), under the name of "Yamland," issued to George Smith, of Alexander, dated the 28th of March, 1862,

and reciting that the warrant therefor was obtained on the 30th of October, 1860. The patent is in the usual form of escheat patents granted by the land-office. The questions presented by this appeal arise upon the plaintiffs' prayer, which was refused, and the fifth, sixth, and seventh prayers of the defendants, which were granted. The facts disclosed by the evidence, and upon which the prayers are based, show that John Guyer, the testator, was a citizen of the United States, domiciled abroad, and that his devisees, the lessors of the plaintiff, are his illegitimate children, and aliens, born and residing in the island of St. Bartholomew. As they take by devise, they are considered in the law as purchasers; this is decided by the supreme court of the United States in *Fairfax v. Hunter*, 7 Cranch, 603. Judge Story, delivering the opinion of the court, page 619, says: "It is clear, at the common law, that an alien can take lands by purchase, though not by descent, or in other words, he cannot take by the act of law, but he may by the act of the party"; and after citing the authorities for this position, he continues: "Nor is there any distinction whether the purchase be by grant or devise. In either case the estate vests in the alien: *Powell on Devises*, 316, etc.; *Attorney-General v. Duplessis*, Park. 144; Co. Lit. 26; not for his own benefit, but for the benefit of the state, or in the language of the ancient law, the alien has the capacity to take, but not to hold lands, and they may be seized into the hands of the sovereign": See also the opinion of Mr. Justice Jonson in the same case, pages 628-630.

The question whether an alien holding lands by purchase can maintain an action for their recovery, is also considered in the case cited. On page 620, Judge Story says: "It seems, indeed, to have been held that an alien cannot maintain a real action for the recovery of lands: Co. Lit. 129; Thel. Dig., c. 6; Dyer, 26; but it does not then follow that he may not defend in a real action his title to the lands against all persons but the sovereign." And we may add that this doctrine of the common law seems to be supported by the authorities cited under the third point in the appellee's brief. It is, however, contended by the appellants that the contrary has been decided in this state by the cases of *McCreery v. Allender*, 4 Har. & McH. 409, and *McCreery v. Wilson*, 4 Id. 412. Those decisions were so construed by the supreme court of New York, in *Bradstreet v. Supervisors*, 13 Wend. 546, and were treated as having been decided entirely upon common-law

principles. This does not appear to us entirely clear. The opinion of Chief Justice Chase in the first case is very brief, and in the second no opinion is given. From an examination of the argument of Mr. Martin, it appears that one of the questions involved was the effect of the British treaty; and a reference to the treaty of 1794, article 9, will show its applicability to the cases then before the court. But without dwelling upon this point, or deciding upon the right of an alien to maintain an action of ejectment for freehold lands in this state, it is very well established that his title is held, not for his own benefit, but for the benefit of the state, and subject to be divested by the state upon an inquest of office found, or other notorious act equivalent thereto. This is settled by the case of *Fairfax v. Hunter*, 7 Cranch, 603. And it only remains to inquire whether the grant of an escheat patent has that effect. In the valuable compilation by Mr. Kelty, the Landholders' Assistant, it is stated that the practice of escheating lands in Maryland without office found prevailed before the end of the proprietary government; that this practice afterwards continued; and that the practice of proceeding upon inquisition of office found, having fallen into disuse, was not afterwards resumed: See pp. 175-177; see also 362, 366, 367, 371. Under the present organization of the land-office, the grant of an escheat patent is the judicial act of the commissioner, before whom all parties in interest have a right to appear, and by their *caveat* to contest its issue, with the right of appeal from the decision; and we are of opinion that the issue of an escheat patent has the same effect as the ancient proceeding by office found, in divesting the title of an alien to freehold lands in this state. In the opinion of this court, the claim of the appellants is not protected by the fourth section of the act of Congress passed April 14, 1802. That act declares "that the children of persons who are or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States." These appellants claim the benefit of that section as the children of John Guyer, who was a citizen of the United States. But the proof shows that they were not born in lawful wedlock; they are therefore illegitimate; under our law *nullius filii*, and clearly therefore not within the provisions of the act of 1802. It follows from the views above expressed, that there was no error in rejecting the

first prayer of the appellants, and that the fifth, sixth, and seventh prayers of the appellee were properly granted.

Judgment affirmed.

POWER OF ALIEN TO HOLD LAND acquired by purchase or devise: *Elmendorf v. Carmichael*, 14 Am. Dec. 86, 97; note to *Jackson v. Fitz Simmons*, 24 Id. 211; *Yeaker's Heirs v. Yeaker's Heirs*, 81 Id. 530, and note 536.

ALIEN MAY BE DIVESTED OF TITLE to lands acquired by purchase, by inquest of office: *Elmendorf v. Carmichael*, 14 Am. Dec. 86; note to *Commonwealth v. Hite*, 29 Id. 233, 234.

ILLEGITIMATE CHILDREN, WHEN MAY INHERIT: *Helmes v. Francisca*, 29 Am. Dec. 402.

PHIPPS v. STATE.

[22 MARYLAND, 392.]

SECTION 17 OF ARTICLE 71, CODE OF MARYLAND, relating to the bedding of oysters, and authorizing any citizen of a county bordering on the waters of the state to locate and appropriate within the waters thereof an area not exceeding one acre, for the purpose of depositing and bedding oysters on certain conditions, is not unconstitutional as conferring special and exclusive privileges inconsistent with and in derogation of the common right of free fishery in the waters of the state. Nor is it repealed by the act of 1861, providing "that no patent shall issue for land covered by navigable waters." The latter only restricts and limits the powers of the land commissioner.

OYSTERS TAKEN BY ONE IN EXERCISE OF HIS COMMON RIGHT of fishery thereby become the property of the taker.

SECTION 17 OF ARTICLE 71, CODE OF MARYLAND, authorizing any citizen of a county bordering on the waters of the state to locate and appropriate within the waters thereof an area not exceeding one acre, for the purpose of depositing and bedding oysters on certain conditions, does not contemplate a transfer of the state's title to land covered by navigable water, but is a conditional license for the protection of private rights, revocable at the will of the legislature. It subtracts nothing from the common right of fishery, nor does it operate as a grant of several rights from the common right residing in the people.

LANDS OF MARYLAND COVERED BY NAVIGABLE WATER may be granted, subject to the public right of navigation and fishery; and independent of the question as to the power of the legislature to restrain those rights by grants in severalty, they may be aided by grants conferring particular privileges.

LEGISLATURE MAY AUTHORIZE ERECTION OF WHARVES, and reclamation of land from water, for the purpose of encouraging navigation and commerce, although the effect is to confer privileges and advantages wholly private and exclusive in their character.

LEGISLATURE MAY GRANT PRIVILEGES affording particular and exclusive benefits, for the purpose of increasing generally the product and value of the common right of fishery.

WHETHER LEGISLATURE HAS POWER TO GRANT SEVERAL OR EXCLUSIVE RIGHTS of fishery in the navigable waters of the state of Maryland, *quære*.

INDICTMENT UNDER MARYLAND CODE must show on its face all facts necessary to constitute the offense charged. In this particular, it must be explicit and certain, and leave nothing to inference. A judgment overruling a demurrer to an indictment defective in this particular will be reversed.

INDICTMENT for taking oysters from the "depot" of one Davis. The indictment was demurred to, the demurrer overruled, and this appeal taken. The opinion contains the facts.

Tuck and Hagner, for the appellants.

Revell, for the state.

By Court, COCHRAN, J. The questions to be considered in this case arise on a demurrer to an indictment for violating the eighteenth section of article 71 of the code. In disposing of the appeal, we are called on to decide: 1. Whether the seventeenth and eighteenth sections of this article are constitutional; and 2. The more general question as to the sufficiency of the indictment founded on them. The seventeenth section authorizes any citizen of any county bordering on the waters of the state to locate and appropriate within the waters thereof any area not exceeding one acre, for the purpose of depositing and bedding oysters, on condition that the area so located should not interfere with any right reserved by the fifteenth and sixteenth sections, nor impede the navigation of navigable waters, and that it should be marked out by stakes or other proper bounds, and a written description thereof, under oath, recorded in the office of the clerk of the circuit court of the proper county.

The constitutionality of the section is questioned on the ground that it confers special and exclusive privileges inconsistent with and in derogation of the common right of free fishery in the waters of the state. It was also suggested that this section, even if the legislature had power to enact it, was repealed by the act of 1861, chapter 129, before the location shown in this case was made. We, however, attach but little importance to this suggestion, as the sole purpose of the provision referred to in that act—"that no patent should issue for land covered by navigable waters"—was to restrict and limit the powers of the land commissioner, and nothing more. The effort to subject section 17 of article 71 to the operation

of the act of 1861 appears to have been made with some misapprehension of the true nature of the question to be decided.

It abundantly appears from the nature of the privilege in dispute, as well as from the terms in which it was conferred, that no transfer of the state's title to lands covered by navigable water was contemplated. Permission to use given areas covered by navigable water for a particular purpose seems to be all that the legislature intended, and we think the language of its assent to that use should be construed, not as a grant binding the state, but as a conditional license, revocable at the pleasure of the legislature.

It is true that it contemplates several and exclusive privileges, and it may be said, privileges that constructively abridge in some qualified sense the common right of the public, although the abridgement of the public right does not constitute the main element of the privilege. The license simply proposes means for the protection of private rights existing, independently of the means. Oysters taken by one in the exercise of his common right of free fishery thereby become the property of the taker, and the whole scope of the privilege conferred appears to be nothing more than permission to use portions of the state lands covered by navigable water as places of deposit, where the title and possession of the property thus acquired may be continued and protected. As we construe it, this privilege subtracts nothing from the common right of fishery, nor can it be said to operate as a grant of several rights from the common right residing in the body of the people. The natural beds or deposits of the oyster do not extend to all the waters of the state, and at most, the argument that the common right to fish for and take them is impaired by the artificial deposits here authorized, would hold good only on proof that a natural bed or deposit is appropriated to the artificial use. It is settled that the lands of the state covered by navigable water may be granted, subject to the public right of navigation and fishery; and independent of the question as to the power of the legislature to restrict those rights by grants in severalty, it is clear that they may be aided by grants conferring particular privileges. The power of the legislature to authorize the erection of wharves and the reclamation of land from the water, for the purpose of encouraging navigation and commerce, has never been questioned, notwithstanding the effect has been to confer privileges and advantages wholly private and exclusive in

their character. And there appears to be no substantial reason why it may not in like manner grant privileges affording particular and exclusive benefits for the purpose of increasing generally the product and value of the common right of fishery. The tendency of the privilege here conferred is undoubtedly in that direction. It affords the citizen enjoying the common right the means of preserving and increasing in value the fruits of his labor,—a result substantially enhancing the worth of the right enjoyed, and contributing also to the general comfort of the people and prosperity of the state. It is not necessary to decide in this case the very important, and perhaps delicate, question, as to the power of the legislature to grant several or exclusive rights of fishery in navigable waters, and we forbear the expression of any opinion upon it. It is enough to say that the grant here objected to does not involve that question. We have examined with much care the authorities referred to in course of the argument, and in accordance with the general current do not hesitate in saying that the legislature did not exceed its power in granting the privilege here drawn in question.

The remaining question, as to the sufficiency of the indictment, would seem to be free from difficulty. The offense charged is a violation of the eighteenth section, and it was unquestionably necessary for the state to show on the face of the indictment all the facts necessary to constitute the offense. In that particular it should be explicit and certain, and nothing left to inference. That could not be done in this case without averring the location and appropriation of the depot by Davis, and the perfection of his right or privilege therein, by recording the written description thereof, as required by the seventeenth section, before the oysters were removed by the traversers. We find by inspection that the indictment does not allege the material fact that the oysters were removed after the right of Davis to the depot was perfected by recording the description of it in the clerk's office. It avers generally that the offense was committed on the 6th of September, 1862, and that the description was recorded on the same day, but whether it was committed before or after recording the description does not appear. In this respect the indictment was defective, and without examining further, we shall reverse the judgment on that ground.

Judgment reversed.

OSTERS, PROPERTY IN: See note to *Wheatley v. Harris*, 70 Am. Dec. 251; *State v. Taylor*, 72 Id. 347; *Arnold v. Mundy*, 10 Id. 356, and note 289.

OSTER-PLANTING IN PUBLIC WATERS becomes a nuisance, and they may be removed when it interferes with navigation: *State v. Taylor*, 72 Am. Dec. 347.

STATE, REPRESENTING PEOPLE, MAY REGULATE common rights and privileges of fishing, and an act of the legislature intended to protect and further such rights is valid: *Moulton v. Libbey*, 59 Am. Dec. 57, and note 66; *Commonwealth v. Chapin*, 16 Id. 386, and note; *Lansing v. Smith*, 21 Id. 89.

SEVERAL RIGHT OF FISHERY IN NAVIGABLE WATER, when and how obtained: *Collins v. Benbury*, 38 Am. Dec. 722, and note 727.

WORDS CONSTITUTING PART OF DESCRIPTION of the crime must be used in the indictment: *Kellenbeck v. State*, 69 Am. Dec. 166, and note 189. Further, as to what description of the offense charged in the indictment is sufficient, see *Alderman v. People*, 69 Id. 321; *Commonwealth v. Webster*, 52 Id. 711; *Parkinson v. State*, 74 Id. 522, and note 524.

HARRISON v. STATE.

[23 MARYLAND, 468.]

CANONICAL DISABILITIES AS REGARDS MARRIAGE are such as render the marriage voidable, and not void: They require a judgment of a court, during the lives of the parties, to make them effective as causes of divorce.

CIVIL DISABILITIES AS REGARDS MARRIAGE, arising from want of capacity to contract, or physical infirmity, avoid the marriage *ipso facto*, without the action of a court.

MARYLAND ACT OF 1777, DECLARATORY OF CANON as part of the common law, and prohibiting marriage between persons related within certain degrees of affinity and consanguinity under certain penalties, declaring that such marriages should be "void," and giving to the general court jurisdiction to hear and determine upon such marriages, did not contemplate that by the use of the word "void" such marriages should be absolutely void *ipso facto*, but only void upon judgment and decree of the court during the lifetime of the parties.

STATUTES IN "PARI MATERIA" ARE TO BE CONSTRUED together, as parts of one system.

CONTEMPORANEOUS LEGISLATION IS BEST STANDARD of the meaning of laws.

WHEN MARRIAGE IS DECLARED VOID BY STATUTE, it does not necessarily mean void *ab initio*. Reason and justice would imply it was void from the time its nullity should be pronounced by a court of competent jurisdiction, not that it should be so construed whenever brought incidentally in question.

STATUTE PENAL IN ITS CHARACTER must be strictly construed.

STATUTE SHOULD NOT BE DECLARED UNCONSTITUTIONAL or invalid in a doubtful case where the doubt is "*bona fide*" and well founded. Declaring a statute unconstitutional is the exercise of a judicial power of grave and delicate nature, which can only be warranted in a clear case.

CONTEMPORANEOUS CONSTRUCTION OF CONSTITUTION, of long duration, continually practiced, under and through which many rights have been ac-

quired, ought not to be shaken but upon the ground of manifest error and cogent necessity.

STATUTE CONFIRMING AND MAKING VALID, from the time of their celebration, all marriages before made and celebrated in or out of the state of Maryland by and between persons related within certain degrees of affinity, and providing that all such marriages shall be held and taken by the courts in the state to be good and sufficient in law, to all intents and purposes, is constitutional, though retroactive in effect, and in conflict with an earlier statute.

RIGHT TO CONFIRM IS NECESSARY COROLLARY OF POWER to dissolve marriage by divorce. The consequence of which is, incidentally, authority to determine the *status* of the issue of the marriage.

LEGISLATION CONFIRMING AND MAKING VALID MARRIAGES which were before voidable is neither extraordinary, unconstitutional, nor unjust, but conservative, essential, and salutary, being the only adequate means of healing or preventing inevitable public and private wrongs.

THE opinion contains the facts.

Brent and Miller, for the appellants.

Alexander and Tuck, for the appellees.

By Court, BOWIE, C. J. Few questions are more interesting or more important to society than those presented by this appeal, viz., the validity of marriages between persons within the prohibited degrees, and the power of the legislature, by retroactive enactments, to restore an inheritable quality to persons otherwise incapable of taking. For the first time since its passage, as far as the records of this court inform us, the interpretation of the act of February, 1777, chapter 12, entitled "An act concerning marriages," is brought in question. The counsel, with an ability and earnestness worthy of the magnitude of the subject, have exhausted the resources of research and argument to illustrate their views, and contributed much to enable us to arrive at satisfactory conclusions. The leading propositions discussed were:—

1. Was the marriage between Robert and Martha Harrison absolutely void, or only voidable?

2. If avoidable, did the act of 1860, chapter 271, cure the incapacity of the contracting parties, and impart to the issue of the marriage the faculty of taking as distributees and heirs at law?

In the first proposition is included the minor one, whether the marriage, being celebrated in the District of Columbia, was within the operation of the first section of the act. The sections important to the consideration of this case are as follows:—

"An act concerning marriages.

"1. If any person within this state shall hereafter marry with any person related within any of the degrees of kindred or affinity expressed in the following table, such marriage shall be void.

"2. That if any person shall hereafter marry with any person related within the three degrees of lineal direct consanguinity, or within the first degree of collateral consanguinity, each of the parties on conviction thereof in the general court shall forfeit and pay £500, or be banished this state forever; and if any person shall hereafter marry with any person related within any other of the degrees of kindred, or within any of the degrees of affinity, each shall forfeit £200."

"6. If any person shall go out of this state and there marry with any person belonging to this state, contrary to this act, each of said parties shall be liable to the same punishment or penalty as if the offense had been committed within this state."

"14. That the chancellor shall and may hear and determine all claims for alimony, in as full and ample manner as such causes could be heard by the laws of England in the ecclesiastical courts there.

"15. That the general court may inquire into, hear, and determine, either on indictment, or petition of either of the parties, the validity of any marriage, and may declare any marriage contrary to the table in this act, or any second marriage, the first subsisting, null and void; and on appeal, the depositions and evidence given in the cause shall be transmitted with the record to the court of appeals, and thereupon such cause shall be heard, determined, and adjudged *de novo*."

The sections not quoted relate to the celebration of marriages, the persons by whom celebrated, and the places, churches, or chapels where celebrated, and the banns and licenses, and penalties for violating the same.

1st Point. The canon and civil law regulating marriages was a part of the common law, administered by ecclesiastical and civil tribunals in England, and transplanted to the colonies by our ancestors, without introducing corresponding courts to enforce them. In the first year of the organization of the state government, 1777, c. 12, the general assembly passed the act entitled "An act concerning marriages." This act was declaratory of the canon as a part of the common law, prohibiting marriages between persons related in such

degrees of consanguinity and affinity as previously prevented their lawfully joining in matrimony. The disabilities enumerated are all canonical disabilities, and not those known to the law as civil disabilities. Canonical disabilities were such as rendered the marriage voidable, and not void. They require the judgment of an ecclesiastical court, during the lives of the parties, to make them effective as causes of a divorce. On the other hand, civil disabilities, such as arose *pro defectu consensus*, for want of a capacity to contract, or physical infirmity, *ipso facto* avoided the marriage without the action of the courts. When the legislature declared by statute that persons laboring under canonical disabilities should not marry under certain penalties, but such marriages should be void, and gave jurisdiction to the general court to hear and determine upon such marriages, it is to be supposed they designed to put persons laboring under such disabilities in the same position they were at common law; viz., they should be void, when established by the judgment of a court, in the life of the parties to the marriage, not to confound canonical and civil disabilities, and destroy the distinction between them. Ecclesiastical judgments were pronounced *pro salute animæ*, to vindicate the divine law, not to assert the rights of property, and therefore were limited to the lives of the parties. The illicit union being dissolved by death, no subsequent proceedings could afterwards affect the rights of the issue. If it was the purpose of the act of 1777 to convert canonical disabilities into civil disabilities, and make such marriages null and void absolutely, the provisions of section 15 were superfluous and useless. All the objects which the law would accomplish consistently with equity and justice are obtained by interpreting these sections collectively, in consonance with the effect of such disabilities, when established by their proper tribunals; and consequences degrading to society and unjust to innocent persons are avoided by this construction. The legislature, by the acts of 1785, c. 35, and 1790, c. 20, ratified and confirmed retrospectively the marriages which the act of 1777, c. 12, had declared void, and this, as was urged in argument, without any reservation of vested rights. These acts, being *in pari materia*, are to be construed together as parts of one system. The distinction between void and voidable was not unknown to the legislators of that day. Such enactments would not have been made, if their provisions were deemed nugatory. Contemporaneous legislation is the best standard of the mean-

ing of laws. When a marriage is declared to be void, it does not necessarily mean void *ab initio*. Reason and justice would imply it was void from the time its nullity should be pronounced by a court of competent jurisdiction, not that it should be so construed whenever brought incidentally in question. This view of the subject is confirmed, in our opinion, by the course of legislation in England. There, the legal validity of marriages previous to the first marriage act (26 Geo. II., c. 33) depended upon the doctrine of the ecclesiastical courts: Shelford on Marriage and Divorce, c. 2, p. 28.

The intention of the statutes of 25 Hen. VIII., c. 22, 28, Hen. VIII., c. 7, 32, Hen. VIII., c. 38, was to restore the Levitical computation, and prevent the impeaching of marriages for consanguinity or affinity, without the Levitical degrees: Shelford on Marriage and Divorce, 162, 165. The statute 26 Geo. II., c. 33, called the marriage act, was founded on the great mischiefs and inconveniences which had arisen from clandestine marriages, and to prevent them in future; hence this act prescribed the place and modes of solemnizing marriages in England; all marriages solemnized after the 25th of March, 1754, without publication of banns or license of marriage, were made null and void to all intents and purposes whatsoever: Shelford on Marriage and Divorce, c. 2, p. 30.

The statute of 5 & 6 Wm. IV., c. 54, recites, that all marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court, pronounced during the lifetime of the parties thereto; and it is unreasonable that the state and condition of the children of marriages between persons within the prohibited degrees of affinity should remain unsettled during so long a period, and it is fitting that all marriages which may hereafter be celebrated between persons within the prohibited degrees of consanguinity or affinity be *ipso facto* void, and not merely voidable: Shelford on Marriage and Divorce, c. 3, p. 156. It therefore enacts that all marriages thereafter celebrated between persons within the prohibited degrees shall be absolutely null and void to all intents and purposes whatsoever. The provisions of this statute are in marked contrast with the act of 1777. It recites the indissoluble character of marriages for canonical disabilities in ecclesiastical courts, except by sentence pronounced during the lifetime of the parties thereto. The inconvenience and unreasonableness of suspending the state and condition of the children of marriages between persons within the prohibited

degrees of affinity, during so long a period, and to cure this evil, and prevent all marriages in future between persons within the prohibited degrees, in emphatic language, declares such marriages shall be absolutely null and void to all intents and purposes whatever, not voidable. The British statute shows an intelligent, deliberate purpose to destroy the distinction between canonical and civil disabilities to this extent.

The Maryland act indicates no such purpose. No ecclesiastical court existed here; and instead of destroying, it erected a jurisdiction with power upon petition of either of the parties, or on indictment, to inquire into, hear, and determine the validity of any marriage, and to declare any marriage contrary to the act null and void. It cannot escape observation, that if the act of 1777, c. 12, makes all such marriages void, the consequence is, the issue of all such marriages is bastardized, and the saving of the rights of children and widows, under the distinction between voidable and void marriages, which the canon law protected, unless the marriage was dissolved during the joint lives of the parties, is lost. Such a construction is so pregnant with serious consequences as not to be adopted without the most cogent and conclusive authority. The chief mischief to be corrected was the intermarriage of persons within the prohibited degrees. There were no courts in existence to take cognizance of such offenses. A new government was just being organized, and our connection with the mother country dissolved. We had just declared "that the inhabitants of Maryland are entitled to the common law of England, and the benefit of such English statutes as existed on the 4th of July, 1776, and which, by experience, had been found applicable." The marriage acts were not among these. It was therefore necessary to re-enact the canon law as part of the common law, not with the design to increase the penalties of their violation, nor to punish the innocent for the guilty, nor to dissolve marriages after the death of the parties, but to create a forum where the canonical disabilities could be enforced during the lives of the parties, and with tender regard to the condition of the unfortunate issue.

"It is not to be presumed that the legislature intended to make any innovation upon the common law, further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified, and besides what has been plainly pronounced; for if the

Parliament had had that design, it is naturally said they would have expressed it. . . .

"By the statute *de donis*, it was enacted that a fine levied of entailed lands *ipso jure sit nullus*, yet the construction was that such fine should not be a nullity, but only a discontinuance": Dwarrris on Statutes, 695. "When a statute alters the common law, the meaning shall not be strained beyond the words, except in cases of public utility, when the end of the act appears to be larger than the enacting words": Id.

The act of 1777, c. 12, being penal in its character, must be taken strictly "in the point of defining and setting down the fact and the punishment." The statute 5 Eliz., c. 4, sec. 41, says "all indentures of apprenticeship, made otherwise than is by that act directed, shall be clearly void in law to all intents and purposes whatsoever." Chief Justice Mansfield observed: "The words of the forty-first section certainly at first startle one. Yet there have been many cases cited which say that indentures which do not conform to the act shall be only voidable, and not void. If the word 'voidable' were applied to adults, it would be extremely strange; with respect to infants, if applied to them, one can understand it. In all those cases the question arose with respect to the rights of infant apprentices; but there has been no case cited when the doctrine that the contract is voidable, not void, is applied to the case of a master, and it would be very wonderful if there were." The acts of the infants under the act of Elizabeth are incomparably less important than those of the issue under the marriage act; and if words of stronger import were relaxed to shield and preserve the former, words of less force may be restricted by the general provisions of the act, and those *in pari materia* to save the latter from disseisin and bastardy.

"There is in our books great looseness and no little confusion in the use of the terms 'void' and 'voidable,' growing perhaps in some degree out of the imperfection of language. There are at least four kinds of defects which are included under these expressions, while we have but those two terms to express them all": 2 Kent's Com. 234; 7 Bac. Abr. 64, tit. Void and Voidable.

"1. Proceedings may be wholly void, without force or effect as to all persons and for all purposes, and incapable of being or being made otherwise; 2. Things may be void as to some person and for some purposes, and as to them incapable of being otherwise, which are yet valid as to other persons, and

effectual for other purposes; 3. Things may be void as to all persons and for all purposes, or as to some persons and for some purposes, though not so as to others, until they are confirmed; but though said to be void, they are not so in the broadest sense of that term, because they have a capacity of being confirmed, and after such confirmation they are binding. For this kind of defect, our language affords no distinctive term. They are strictly neither void, that is, mere nullities, nor voidable, because they do not require to be avoided; but until confirmed, they are without validity. They are usually spoken of as void, and as usage is the only law of language, they are so called correctly. It is therefore always to be considered an open question, to be decided by the connection and otherwise, whether the term 'void' is used in a given instance in one or the other of these, in some respects dissimilar, senses": *State v. Richmond*, 26 N. H. 288.

By the 26 Geo. II., c. 83, sec. 8, all marriages solemnized contrary to that act "shall be null and void to all intents and purposes whatsoever." "In the case of *Crompton v. Bearcroft*, Bul. N. P. 113, cited in *Bac. Abr.* 459, note *a* (December 1, 1768), the appellant and respondent, both being English subjects, and the appellant under age, ran away without the consent of her guardian, and were married in Scotland, and in a suit brought in the spiritual court to annul the marriage, it was holden that the marriage was good." The annotator of *Bac. Abr.* adds: "If Gretna Green marriages were invalid according to English law, and dependent for validity solely on the Scotch law, there would seem to be ground to doubt the soundness of the decisions holding them valid; for it is apprehended that when parties merely pass into Scotland to make the contract of marriage, and immediately return to England, the law of England properly governs the contract, according to Lord Mansfield's observations in *Robinson v. Bland*, 2 Burr. 1097, and according to the principle laid down by Huber, *De Confl. Legum*," etc.: 6 *Bac. Abr.* 469, note *a*.

When it is considered that the table of prohibited degrees, adopted by the marriage act, embraced both lineal and collateral relations, those by consanguinity as well as affinity, and pronounced them alike void, without regard to the degree of consanguinity or affinity, it is impossible to presume that the word "void" was used in its most absolute and unrestricted sense. The fourteenth section recognizes the existence of the ecclesiastical courts in England, and confers upon

the chancellor, in all causes for alimony, power to hear and determine in as ample a manner as such causes could be heard in the ecclesiastical courts there. Is it a forced construction to say that when in the fifteenth section it authorizes the general court to inquire into, hear, and determine either on indictment or petition of either of the parties, the validity of any marriage, and declare any marriage contrary to the table null and void, it was intended that the same rules which prevailed in the ecclesiastical courts in such cases should prevail in the general court, and until such decree or judgment of the general court, the marriage should not be void, but voidable?

The act evidently imports there should be action in the lifetime of the parties, and requires, upon appeal, that "the depositions and evidence given in the cause shall be transmitted with the record to the court of appeals, and thereupon such cause shall be heard and adjudged *de novo*. Why so much care for the living, if after death the innocent issue, when all evidence has been lost, may be pronounced illegitimate, and deprived of their patrimony. It is not for human tribunals to visit the sins of the parents upon the children. We hold, therefore, that the word "void" is to be understood void upon judgment or decree, for that purpose found or passed, and not *ipso facto* void.

2d Point. A series of decisions of this court upon the constitutionality of laws enacted by the general assembly has established these principles of construction. A legislative act should not be pronounced unconstitutional or invalid in a doubtful case, where the doubt is *bona fide* and well founded. It is the exercise of a judicial power of a grave and delicate nature which can only be warranted in a clear case: *Regents of University v. Williams*, 9 Gill & J. 383 [31 Am. Dec. 72]; *Doyle v. Commissioners*, 12 Id. 484; *Commissioners of Public Schools of A. Co. v. County Commissioners*, 20 Md. 449.

"A power exercised by the general assembly from the adoption of the constitution to the present time ought to be deemed almost conclusive evidence of its possession by that body." A contemporaneous construction of the constitution of such duration, continually practiced under, and through which many rights have been acquired, ought not to be shaken but upon the ground of manifest error and cogent necessity: *State v. Mayhew*, 2 Gill, 487.

The act of 1860, c. 271, enacts, "that all marriages here-

tofore made and celebrated in or out of this state, by and between persons related within the following degrees of affinity, to wit, a man and his niece, or a woman and her nephew, be and the same are hereby confirmed and made valid, to every intent and purpose, from the time of the celebration of such marriages respectively; and every such marriage shall be held and taken by all courts of this state to be good and sufficient in law, to all intents and purposes; and this section shall be in force from the day of its passage." This act is said to be retroactive in its effect, transcending the limits of legislative power, prescribed by the nature of society and of government, and unconstitutional because it destroys vested rights; for which various authorities are cited. It is impossible to reconcile all the adjudged cases on this subject. Our province is to ascertain and announce the law of this state, following, as closely as possible, the principles and precedents established by our own courts. There is no clause in our constitution inhibiting retroactive laws in civil cases. The prohibition of *ex post facto* laws applies only to criminal cases. "There are many laws of a retrospective character, which may be passed constitutionally, by state legislatures, however unjust, oppressive, or impolitic they may be": 2 Story's Const. Law, sec. 1398, and note 1, and authorities there cited. Although retrospective laws are said to be generally unjust, we do not concur in their indiscriminate condemnation. A large class of these laws are eminently wise, conservative, and necessary, nor are they, because retrospective, essentially judicial. The acts of 1785, c. 85, and 1790, c. 20, repealing certain clauses of the act of 1777, c. 12, prohibiting marriages between certain degrees of affinity and consanguinity, confirmed to all intents and purposes the marriages which had in the mean time been made contrary to the act repealed. The act of 1860, c. 271, after a lapse of seventy years is a legislative exercise of the same healing power. Whether the objects of its exercise in the last instance were as meritorious as those of the first, is not the part of judicial duty to determine. The subject-matter and the power were the same. If the former were constitutional enactments, the latter must necessarily be so. Marriage, the subject of these acts of legislation, although it has been tersely called the mother, not the child, of society, is molded by municipal law. "It is a contract of a peculiar nature, and differing in some respects from all other contracts, so that the rules of law which are applicable in expounding

and enforcing other contracts may not apply to this. It differs from other contracts in this, that the rights, obligations, or duties arising from it are not left entirely to be regulated by the agreements of parties, but are, to a certain extent, matters of municipal regulation, over which the parties have no control by any declaration of their will. They are regulated in many important particulars by the laws of every civilized country, and such laws must be considered as forming a most essential part of the public laws of the country": Shelford on Marriage and Divorce, 17. These laws, like those of divorce, must be viewed "as regular exertions of legislative power," emanating from the general assembly from the earliest times: *Crane v. Meginnis*, 1 Gill & J. 474 [19 Am. Dec. 237]; *Wright v. Wright*, 2 Md. 448 [56 Am. Dec. 723].

The right to confirm is the necessary corollary of a power to dissolve marriage by divorce. The consequence of which is, incidentally, authority to determine the *status* of the issue of the marriage. In this state, the legislature has exercised for three fourths of a century the most plenary power over the marriage contract. It cannot be predicated of such legislation, because it incidentally affects the rights of property, that it conflicts with indefeasible or vested rights. Heirship and succession are incidents of marriage, and follow its regulation. Where the parties contracting marriage labor under legal disabilities, the contract is liable to be dissolved by the courts, or affirmed by the legislature. All standing in any degree of relationship are subject to be affected by anything which operates on those they are related to. Their rights are inchoate, not vested. The exercise of similar powers by the general assembly for various purposes, affecting incidentally the rights of others retroactively, is shown by the cases cited by the appellant's counsel, up to a very recent date: See *Lawrence v. Heister*, 8 Har. & J. 371; *Dulany v. Tilghman*, 6 Gill & J. 461. From *Crane v. Meginnis*, 1 Id. 474 [19 Am. Dec. 237], in 1829, to *Wright v. Wright*, 2 Md. 448 [56 Am. Dec. 723], in 1852, the action of the legislature in matters of divorce was judicially recognized as a regular exercise of legislative power, notwithstanding the act of 1841, c. 262, had in the mean time invested the chancellor or any county court of this state as a court of equity, with jurisdiction of all applications for divorces *a vinculo matrimonii*. The act to divorce Jane E. Wright from her husband, Samuel J. Wright, was passed without notice to him of the proceedings, and divested him of his marital rights

in the wife's land. Analogous cases to those already cited are the special acts of assembly conferring the rights of appeal in pending cases, which have been recognized in various instances, from *Davis v. Calvert*, 5 Gill & J. 269 [25 Am. Dec. 282], in 1831, to *State v. Northern Central R. R. Co.*, 17 M.I. 8, in 1861. If it were necessary, numerous instances in our sister states might be added to the catalogue, establishing the position that such legislation is neither extraordinary, unconstitutional, nor unjust; but conservative, essential, and salutary, being the only adequate means of healing or preventing inevitable wrongs, public and private.

The *Regents of University v. Williams*, 9 Gill & J. 365 [31 Am. Dec. 72], relied on by the appellees to sustain their position that the act of 1860 was opposed to the fundamental principles of right and justice inherent in the nature and spirit of the social compact, bears no analogy to the present in any of its features. That was an attempt to abolish a private corporation, and invest another with all the franchises and property of the corporation to be abolished. It was a legislative ouster affecting that particular body, in the nature of a sentence rather than a law. No charter is violated by the act in question in this case; it does not exhaust itself upon any particular persons, nor are the fundamental principles of right and justice impaired. The confirmation of defective deeds, imperfect contracts, or of marriages contrary to the provisions of pre-existing laws, was not in that or any of the cases cited herein denied to be within the constitutional power of the general assembly; but the exertion of the power in the particular case was adjudged unconstitutional for the reasons assigned. It is enough to distinguish this from the cases cited by the appellee, that this act confirms and does not infringe, ratifies but does not divest, quiets the possession and assures the title of children born in wedlock, by giving it the sanction of law,—*Hæres est quem nuptiæ demonstrant*.

It follows from the preceding views that the prayer granted by the court below, assuming that the marriage between Robert and Martha Harrison was void *ab initio*, and not made valid by the act of 1860, c. 271, was, in our judgment, improperly granted, and the judgment below must be reversed. This conclusion being decisive of the action, it is unnecessary to discuss the minor points mooted in the argument of the cause.

Judgment reversed.

BARTOL, J., dissented.

STATUTES IN PARI MATERIA are to be construed together: *Pinckney v. Henegan*, 49 Am. Dec. 592, and note 596; *Scarborough v. Watkins*, 50 Id. 523, and note 540; *Neill v. Keese*, 51 Id. 748.

CONTEMPORANEOUS CONSTRUCTION OF STATUTE IS GENERALLY BEST: *Bruce v. Schuyler*, 46 Am. Dec. 447; *Chenut v. Shane*, 47 Id. 387; *Bishop v. Boyle*, 65 Id. 615, and note 618; *In re Will of Warfield*, 83 Id. 49.

PENAL STATUTES ARE TO BE STRICTLY CONSTRUED: *Warner v. Commonwealth*, 44 Am. Dec. 114.

EVERY PRESUMPTION IS MADE IN FAVOR OF CONSTITUTIONALITY OF STATUTE: *Lopisville etc. R. R. Co. v. County Court, etc.*, 62 Am. Dec. 424. Its constitutionality must be maintained if possible, and it must not be declared void, except in a clear and unavoidable case: *Santo v. State*, 63 Id. 487; *Mayer etc. of Baltimore v. State*, 74 Id. 572, and numerous citations in notes to these cases.

STATUTE MAKING VALID TO ALL INTENTS AND PURPOSES all marriages previously celebrated in the state is not void as repugnant to the United States constitution, and the courts have no authority to declare it void if it be just and reasonable, and conducive to the public good: *Gosken v. Stonington*, 10 Am. Dec. 121, and note.

REMEDIOFECTIVE STATUTES ARE CONSTITUTIONAL when remedial in their nature, and which do not infringe upon vested rights: *Wynne's Lessee v. Wynne*, 58 Am. Dec. 66; *Russle v. Kennedy*, 58 Id. 239; *Boston v. Osmundus*, 60 Id. 717; *Henderson etc. R. R. Co. v. Dickerson*, 66 Id. 143, and notes to these cases.

MARRIAGE PROHIBITED BY LAW is not void until declared so: *Park v. Barron*, 65 Am. Dec. 641.

THE PRINCIPAL CASE IS DISTINGUISHED in *Grove v. Todd*, 41 Md. 644.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

PETTINGILL v. PORTER.

[3 ALLEN, 1.]

RECALLS IN RECENT DEED AS EVIDENCE WHEN BOTH PARTIES ARE DEAD. —

Although both grantor and grantee in recent deed are dead, its recitals as to ownership and boundaries of land adjoining that which is conveyed therein are not admissible in evidence against one who has subsequently become the owner of the granted premises, and who claims a right of way over the adjoining land, as appurtenant to other land held by him under a prior deed from the same grantor.

QUESTION INVOLVING DETERMINATION OF FACTS IN DISPUTE IS PROPERLY LEFT TO JURY, and no exception will lie to the refusal of a judge to rule upon it as a matter of law.

WAY OVER OTHER LAND OF GRANTOR IN DEED MAY PASS AS APPURTENANT TO LAND GRANTED, even though there be no "insuperable physical obstacles" to prevent access by another way, if such other way cannot be made "without unreasonable labor and expense." And a jury in determining this question may consider the comparative value of the land and the probable cost of such a way.

TERMS "NECESSARY" AND "UNREASONABLE LABOR AND EXPENSE" DEFINED. In determining necessity for ways to pass with land, the word "necessary" does not mean absolute physical necessity; and "unreasonable labor and expense" means excessive and disproportionate to the value of the property purchased.

TORT to recover damages for the obstruction of a way by erecting a fence across it. The action was originally brought by Moses Pettingill, and after his death was prosecuted by the plaintiff as his administratrix. The deed from Warren Porter to Moses Welch, mentioned in the opinion, was dated December 8, 1846. Plaintiff with this deed also offered in evidence a subsequent deed of the land from Welch to Moses

Porter, and of the administrator of Porter to her intestate. Neither of these deeds contained any express grant of the way; but conveyed the land, with all the privileges and appurtenances thereto belonging. The subsequent deed from Warren Porter to Moses Welch, offered by the defendants, and mentioned in the opinion, was dated June 14, 1848. It conveyed a small lot of land, and described the lot over which the way was alleged to exist as land of the grantor. The land conveyed by this deed was subsequently conveyed to the plaintiff's intestate. This deed was excluded, although it was shown that the grantor and grantee named therein were both dead. It appeared that the estate conveyed by Warren Porter to Moses Welch, described in the deed put in by the plaintiff, was part of a larger estate, which said Warren Porter took by devise from his late father, Zerubbabel Porter; that from a period before the commencement of the present century to the time of Warren Porter's last-described deed, Warren Porter or his father owned all this larger estate; that a small lot, which adjoined, or was carved out of this larger one, was conveyed by Zerubbabel Porter in his lifetime, through a third person, to Mary Porter, his wife; and that she died intestate in the lifetime of her husband, whose death occurred in 1845, leaving said Warren Porter and Elias E. Porter as her heirs at law. Adjoining the smaller and larger estates was a triangular piece of land, claimed by the defendants to fall partly within the larger and partly within the smaller lot, and to have been originally a part of the highway. The plaintiff's deed included part of it, and the fence complained of was erected upon the boundary line. The record of the court of sessions showed that if this constituted a part of the highway, it was discontinued in 1807. Evidence was introduced, but not of any witness who remembered of the use of the alleged way over this triangular piece of land, or as far back as the discontinuance of the highway, or further back than the time when Zerubbabel Porter owned both the large and small lots. The triangular piece of land appeared to have lain open from time out of mind, and no evidence as to the ownership was offered except what appeared from the title to the adjoining lots and the discontinuance of the highway; but the ownership was in dispute, and it was also in dispute whether the same was ever a part of the highway, and discontinued, as stated above. The nature of the material instructions objected to and given appear in the opinion. It appeared that the estate conveyed had a

large front upon the highway; that there were no insuperable physical obstacles, such as ledges, swamps, or the like, to prevent access by another route; that the soil was light and easily worked; that the road and adjoining estate, especially in front of the plaintiff's house, were about upon a level; and there was no evidence to show that any greater difficulty would be found in constructing the road suggested than over any field through which it might be necessary to construct a carriage road; or at any rate, nothing more than a single culvert to allow the passage of surface water after heavy rains. The plaintiff then introduced evidence as to the amount of labor and expense necessary for the construction of such new way; and both parties introduced experts, who computed the probable cost of constructing a new road. No evidence was offered of the value of the land. The judge ruled that the jury might take into consideration the probable cost of a new road, compared with the value of the land; but did not instruct them, as requested, as to inferences from the consideration named in the deed. Verdict for plaintiff, and defendants alleged exceptions.

S. H. Phillips and J. C. Perkins, for the defendants.

W. C. Endicott, for the plaintiff.

By Court, CHAPMAN, J. 1. The plaintiff claims title in her intestate to the land to which the alleged way is claimed as appurtenant, under a deed of Warren Porter to Moses Welch. The defendants offered in evidence a subsequent deed from Warren Porter to Moses Welch, conveying an adjoining tract of land. The plaintiff does not claim that the alleged way was appurtenant to the land conveyed in this deed, and the defendant offered it for the purpose of taking advantage of the recitals therein as to the boundaries and ownership of the adjoining estate, over which the alleged way passed. This evidence was properly excluded, because, although both the parties were dead, it was a recent transaction; and because, if it tended to show that Warren Porter claimed title to the adjoining estate in 1848, it cannot be inferred therefrom that he claimed such title in 1846, when he made the other deed to Welch.

2. The defendants requested the court to instruct the jury that there was no evidence of the existence of any right of way by prescription up to the time when Warren Porter conveyed to Moses Welch, in 1846. It sufficiently appeared that

the way had been used; but the request was based upon the alleged ground that Warren Porter owned the triangular piece over which the way passed. But questions of fact were in dispute as to the actual position and boundaries of the lots, and the question appears to have been properly left to the jury.

3. The defendants object to the qualified ruling of the court, that no right of way over what was Warren Porter's land would pass by the deed relied on by the plaintiff, unless it appeared that the grantee could not obtain access to his house by another route without unreasonable labor and expense. This instruction was based on the assumption of the defendants, that Warren Porter owned the triangular piece when he made his first deed to Welch. It appears that the only way which he had been accustomed to pass over to reach the highway had been across this triangular piece; and the question which arose between the parties was, whether, as he did not convey the triangular piece, or expressly convey a right of way over it, such right passed under the grant of "all the privileges and appurtenances thereto belonging."

The instruction on this subject was, "that the deed under which the plaintiff claimed conveyed whatever was necessary to the beneficial enjoyment of the estate granted, and in the power of the grantor to convey; that it was not enough for the plaintiff to prove that the way claimed would be convenient and beneficial, but she must also prove that no other way could be conveniently made from the highway to her intestate's house without unreasonable labor and expense; that unreasonable labor and expense means excessive and disproportionate to the value of the property purchased; and that it was a question for the jury, on all the evidence, whether such new way could be made without such unreasonable labor and expense."

The court are of opinion that this instruction was correct. The word "necessary" cannot reasonably be held to be limited to absolute physical necessity. If it were so, the way in question would not pass with the land if another way could be made by any amount of labor and expense, or by any possibility. If, for example, the property conveyed were worth but one thousand dollars, it would follow from this construction that the plaintiff's intestate would not have the right of way over the triangular piece as appurtenant to the land, provided he could have made another way at an expense of one hundred thousand dollars. If the word "necessary" is to have a more

liberal and reasonable interpretation than this, the one adopted by the judge must be regarded as correct. Its effect was to require proof that the way over this triangular piece was reasonably necessary to the enjoyment of the dwelling-house granted: See *Ewart v. Cochrane*, 7 Jur., N. S., 925; *Leonard v. Leonard*, 2 Allen, 543; *Carbrey v. Willis*, 7 Id. 364.

4. As the facts were properly submitted to the jury, and evidence was admissible as to the consideration paid for the land and the cost of making a way, it was proper that the jury should compare the facts together and make such inferences as they should think reasonable. The instruction on this point was correct.

Exceptions overruled.

JURY ARE JUDGES OF FACTS: *Potts v. House*, 50 Am. Dec. 329, and note 360; *Kirkwood v. Gordon*, 62 Id. 418.

THE PRINCIPAL CASE WAS OTTED in the following authorities and to the point stated: Mere convenience and usefulness are not sufficient to establish a way of necessity. In order to establish an implied reservation of such a way there must be, at the time of the grant, a reasonable necessity for its existence: *Oliver v. Pitman*, 98 Mass. 50. So where one owned a lot to which an aqueduct had been laid for the purpose of taking water, and the easement in the water and the aqueduct were manifestly necessary for the reasonable enjoyment of that lot, the subsequent conveyance of his title in the lot was held to pass his right in the water and aqueduct without any express mention thereof: *Hollenbeck v. McDonald*, 112 Id. 250. And any right of way or other easement necessary to the enjoyment of premises granted will pass as appurtenant, although there is no express mention of easements, privileges, or appurtenances: *Oliver v. Dickinson*, 100 Id. 117. "It may well be doubted whether it might not have been wiser to have always restricted both implied grants and implied reservations to easements of necessity; not, perhaps, of absolute, physical necessity, but of reasonable necessity, as distinguished from mere convenience": *Dillman v. Hoffman*, 38 Wis. 574.

WAYS BY NECESSITY. — 1. *Ways of Necessity Exist only over Lands of Grantors.* — The subject of ways from necessity is discussed in *Gayetty v. Bethune*, 7 Am. Dec. 188; *Pernam v. Wead*, 3 Id. 43; *Taylor v. Townsend*, 5 Id. 107; *Turnbull v. Rivers*, 15 Id. 622; *Farnum v. Platt*, 19 Id. 330; *Brown v. Burkenmyer*, 33 Id. 541; *Nichols v. Luce*, 35 Id. 302; *Collins v. Prentice*, 38 Id. 61; *Stuyvesant v. Woodruff*, 47 Id. 156; *Snyder v. Warford*, 49 Id. 94; *Heffeld v. Baum*, 57 Id. 563; *Kimball v. Cochecho R. R.*, 59 Id. 387; *McTavish v. Carroll*, 61 Id. 353; *Brigham v. Smith*, 64 Id. 76; *Screen v. Gregorie*, 64 Id. 747; *Hall v. McLeod*, 74 Id. 400; *Lide v. Hadley*, 76 Id. 338; *Tracy v. Atherton*, 82 Id. 621; and in the extended notes to *Lawton v. Rivers*, 13 Id. 746, 747; *Cooper v. Maupin*, 35 Id. 464, 465; *Campbell v. Race*, 54 Id. 731-734. Ways of necessity only exist over lands of grantors: Washburn on Easements and Servitudes, 258; *Taylor v. Warnaky*, 55 Cal. 350. If A conveys land to B, to which B can have access only by passing over the other land of A, a way of necessity passes to B by the grant; and if A conveys land to B, leaving the remaining land of A inaccessible unless by passing over the land

so granted, a way of necessity is reserved to A in the grant. Indeed, one fundamental requisite for the creation of a necessity is a common ownership of the plaintiff's land and the defendant's land at a time when either was conveyed. A way of necessity cannot legally exist where neither the party claiming the way, nor the owner of the land over which it is claimed, nor any one under whom they or either of them claim, was ever seised of both tracts of land at the same time, and the way can only be created when one of the tracts is conveyed or the ownership changed by operation of law: *Woodworth v. Raymond*, 51 Conn. 70; *Tracy v. Atherton*, 35 Vt. 52; S. C., 82 Am. Dec. 621. A unity of possession of both tracts at some former time appears to be the foundation of the right: See case last cited.

2. *Way of Necessity, Founded upon What Doctrine.* — A way from necessity is an easement founded on a grant; it is an implication from a grant, and is an application of the principle that wherever one party conveys property, he also conveys whatever is necessary to the beneficial use of that property. Being founded on a grant, questions as to when such ways exist arise only between grantor and grantee: See note to *Cooper v. Maupin*, 35 Am. Dec. 464; *Proctor v. Hodgson*, 10 Ex. 826; *Nichols v. Luce*, 24 Pick. 102; S. C., 35 Am. Dec. 302; *Tracy v. Atherton*, 35 Vt. 52; S. C., 82 Am. Dec. 621; *Snyder v. Warford*, 11 Mo. 513; S. C., 49 Am. Dec. 94; *Dodd v. Burchell*, 1 Hurl. & C. 122; *Carey v. Rae*, 58 Cal. 159; *Alley v. Carleton*, 29 Tex. 74. A right of way is not any interest in land, but merely an easement, which does not conflict with the absolute proprietorship of the owner: *Snyder v. Warford*, 11 Mo. 513; S. C., 49 Am. Dec. 94. A way of necessity is not created by mere necessity, but always grows out of some grant, or change of ownership by operation of law, to which it is attached by construction as a necessary incident: *Woodworth v. Raymond*, 51 Conn. 70; *Winwell v. Minogue*, 57 Vt. 616; *Tracy v. Atherton*, 35 Id. 52; S. C., 82 Am. Dec. 621. The necessity is only evidence to establish the implied grant or reservation of such right: *Winwell v. Minogue*, 57 Vt. 616.

3. *Ways of Necessity must be Supported by Necessity.* — In Massachusetts, a reasonable necessity is sufficient: *Oliver v. Pitman*, 98 Mass. 50; *Hollenbeck v. McDonald*, 112 Id. 250; *Oliver v. Dickinson*, 100 Id. 117; but as a general rule it is held that it must be a strict necessity; an absolute, indispensable one, to give the right. A mere inconvenience, however great, will not do. It is necessity, and not inconvenience, that gives the way: See *White v. Bradley*, 66 Me. 254; *Nichols v. Luce*, 24 Pick. 102; S. C., 35 Am. Dec. 302; *Cooper v. Maupin*, 6 Mo. 624; S. C., 35 Am. Dec. 456, and extended note thereto 465; *Martin v. Patin*, 16 La. 57; *Screen v. Gregorie*, 8 Rich. 158; S. C., 64 Am. Dec. 747; *Lawton v. Rivers*, 2 McCord, 445; S. C., 13 Am. Dec. 741, and extended note thereto 747; *Turnbull v. Rivers*, 3 McCord, 131; S. C., 15 Am. Dec. 622; *McDonald v. Lindall*, 3 Rawle, 492; *Myers v. Dunn*, 49 Conn. 71; *Seeley v. Bishop*, 19 Id. 128; *Seabrook v. King*, 1 Nott & McC. 140; *Alley v. Carleton*, 29 Tex. 74; *Morris v. Edgington*, 3 Taunt. 24; *Carey v. Rae*, 58 Cal. 159; *Hyde v. Jamaica*, 27 Vt. 443; *Dodd v. Burchell*, 1 Hurl. & C. 122; *White v. Bradley*, 66 Me. 254. Thus, a road of necessity is to be distinguished from a road of convenience: *Hyde v. Jamaica*, 27 Vt. 443. And the impassability of a road gives to the plaintiff no right to an easement. It may confer a personal temporary right which he has in common with the traveling public to pass over the land of another where an established road is impassable; but that is not a right which is incident or appurtenant to his estate: *Carey v. Rae*, 58 Cal. 159. But the right to go upon adjoining land where highway is impassable, is discussed in an extended note to *Campbell v. Race*, 54 Am. Dec.

731-734. This note also discusses the right to go *extra viam* over another's land where a private way is impassable. A way by necessity never exists where a man can get to or from his own property over his own land, however inconvenient the way through his own land may be: *M'Donald v. Lindall*, 3 Rawle, 492; nor will the inconvenience of going always to one's own plantation by water give such a right: *Turnbull v. Rivers*, 3 McCord, 131; S. C., 15 Am. Dec. 622; nor where there is room to go around the lands of a neighbor: *Martin v. Patin*, 16 La. 57. If, however, a necessity has existed, if but for a day, the claim to such a way is as well founded as where it has existed for half a century: *Lawton v. Rivers*, 2 McCord, 445; S. C., 13 Am. Dec. 741, and note 747, where the term "necessity" is discussed at some length, and the principal case cited. For comments upon the principal case, see also note to *Cooper v. Maupin*, 35 Am. Dec. 464. A way of necessity, however, to and from a highway, across land, for a certain purpose, is not limited to the necessity as it existed at the time of the purchase, but may be used for purposes made necessary by the subsequent erection of a dwelling-house upon the land, for the law desires and encourages proprietors to increase the value of their land by building houses upon and cultivating it: *Myers v. Dunn*, 49 Conn. 71.

4. *Ways of Necessity Exist only so Long as Necessity Continues*: See extended note to *Cooper v. Maupin*, 35 Am. Dec. 465, and numerous cases there cited; also, *Collins v. Prentice*, 15 Conn. 39; S. C., 38 Am. Dec. 61; *Seeley v. Bishop*, 19 Conn. 128; *Abbott v. Stewartstown*, 47 N. H. 230; for it is a fallacy to suppose that a right of way of necessity is a permanent right, and the way a permanent way, attached to the land, and which may be conveyed by deed, irrespective of the continuing necessity of the grantee: *Alley v. Carleton*, 29 Tex. 74; *Seeley v. Bishop*, 19 Conn. 128; *New York Life etc. Ins. Co.*, 1 Barb. Ch. 353.

5. *Ways of Necessity — Cases in Which They Exist*. — Right of way by necessity exists in all cases where a person owns land surrounded by other lands which exclude it from a public highway: *Snyder v. Warford*, 11 Mo. 513; S. C., 49 Am. Dec. 94; *Brown v. Burkenmeyer*, 9 Dana, 159; S. C., 33 Am. Dec. 541; *Turnbull v. Rivers*, 3 McCord, 131; S. C., 15 Am. Dec. 622; note to *Cooper v. Maupin*, 35 Id. 464, and numerous cases there cited; *New York Life Ins. etc. Co. v. Milnor*, 1 Barb. Ch. 353; *Brice v. Randall*, 7 Gill & J. 348; *Trask v. Patterson*, 29 Me. 499; *Kuhlman v. Hecht*, 77 Ill. 570; or where it is otherwise inaccessible: *Turnbull v. Rivers*, 3 McCord, 131; S. C., 15 Am. Dec. 622; *Goyetty v. Bethune*, 14 Mass. 49; S. C., 7 Am. Dec. 188; note to *Cooper v. Maupin*, 35 Id. 464, and numerous cases there cited; *Collins v. Prentice*, 15 Conn. 39; S. C., 38 Am. Dec. 61; *Brigham v. Smith*, 4 Gray, 298; *Kimball v. Cochecho R. R.*, 27 N. H. 448; S. C., 59 Am. Dec. 387; *McTavish v. Carroll*, 7 Md. 352; S. C., 61 Am. Dec. 353; *Lore v. Stiles*, 25 N. J. Eq. 381; *Bullard v. Harrison*, 4 Manle & S. 391; *Proctor v. Hodgson*, 10 Ex. 825. And this is the French law: "Every proprietor whose fields are surrounded, and who has no outlet to the public road, may claim a passage over the fields of his neighbors for the agricultural purposes of his estate, on condition of an indemnity proportioned to the injury which he may occasion": Code Napoleon, sec. 682. But a grantee obtains no right of way by necessity, except when his land is surrounded by, or is inaccessible except through, the lands of his grantor: *Trask v. Patterson*, 29 Me. 499. The question as to how far, and in what way, a right of way may arise from necessity by operation of law, is considered in the note to *Jeter v. Mann*, 2 Hill (S. C.), 643. Where a judgment creditor levies on a part of the debtor's land, and leaves the latter no passage from the remaining portion to the highway, the debtor has necessarily

a right of way over the land levied upon: *Pernam v. Wead*, 2 Mass. 203; S. C., 3 Am. Dec. 43. So when land of a debtor is set off on execution, and to which no access can be had except over other lands of the debtor, the creditor may have set off to him a right of passage over such other lands, either separately or jointly with the debtor: *Taylor v. Townsend*, 8 Mass. 411; S. C., 5 Am. Dec. 107. In fact, it may be laid down as a general proposition that a way of necessity may be created, where the dominant estate is set off on execution from the servient estate, if no way is described in the set-off, and the owner of the servient estate does not assign, or offer to assign, any way: *Schmidt v. Quinn*, 136 Mass. 575. But it has been held, where an execution was levied on land, taking the whole front of a farm, except a narrow strip on one side connecting the back land with a county road, and which could not be made passable for carriages at an expense less than from twenty-five to three hundred dollars, that this did not create a way of necessity over any part of the land levied on: *Allen v. Kincaid*, 11 Me. 155. A person cannot have a right of way as an easement, in the legal sense of the word, over his own land; for as the ownership of the soil and the appendancy of the way are in the same person, the appendancy becomes extinct. In other words, the unity of ownership in this sense extinguishes the easement of way: *Screenes v. Gregorie*, 8 Rich. 158; S. C., 64 Am. Dec. 747; *Morris v. Edgington*, 3 Taunt. 24; *Stuyvesant v. Woodruff*, 21 N. J. L. 133; S. C., 47 Am. Dec. 156. And a right of way by necessity does not exist when the party claiming it has a way over his own land: *Stuyvesant v. Woodruff*, 21 N. J. L. 133; S. C., 47 Am. Dec. 156. Neither can a party have a way by necessity over the land of another to connect different parts of a tract of land belonging to himself: *Cooper v. Maspin*, 6 Mo. 624; S. C., 35 Am. Dec. 456. And where a resident on an island has a way by water to a public road, of no greater length than a passage through a neighbor's field, no sufficient necessity exists to create a way through the field: *Lawton v. Rivers*, 2 McCord, 445; S. C., 13 Am. Dec. 741. If the grantee can reach his land by water, or by a distant or difficult road, he is not entitled to a way, as of necessity, across lands of the grantor: *Turnbull v. Rivers*, 3 McCord, 131; S. C., 15 Am. Dec. 622; and a right of way by necessity through an alley over another's land does not exist where the party claiming it has an outlet over his own land: *Ogden v. Grove*, 38 Pa. St. 487.

6. *Way of Necessity, Who is to Designate Course of.* — Where the grantee claims a way of necessity, and it appears that a way had been in use for the benefit of his estate before its conveyance, it would seem that it ought to be continued if reasonably convenient: *Pinnington v. Galland*, 9 Ex. 1. But if a way of necessity is to be designated anew, the right of selecting the place over which it shall be used lies with the owner of the land over which it is to pass, provided, upon request, he shall designate it in a reasonable manner, and he may so do it as to be least inconvenient to himself: *Capers v. Wilson*, 3 McCord, 170; *Schmidt v. Quinn*, 136 Mass. 575; *Russell v. Jackson*, 2 Pick. 573; *Holmes v. Seely*, 19 Wend. 507; *Hart v. Connor*, 25 Conn. 331. But if the owner of the land fail to designate such a way when requested, an action should be brought against him: *Capers v. Wilson*, 3 McCord, 170; or the party who has the right to use it may select a suitable route for the same, having regard to the interest and convenience of the owner of the land over which it passes: *Holmes v. Seely*, 19 Wend. 507. Thus, when a tenant has a right of way of necessity across his landlord's land, it is the landlord's right to fix the line on which it shall run, but if he does not do so the tenant may fix it; and when once fixed it binds both: *Powers v. Harlow*, 53 Mich. 507. The

location of ways arising from necessity may, however, be made and changed by the concurrence of the parties, without formal agreement, or designation in writing. Such location or change may be inferred from the acts or acquiescence of the parties: *Rumill v. Robbins*, 77 Me. 193. And the same principle of necessity which raises the implication of one way of necessity may extend it to two or more such ways. Where the grantor of land, who had reserved a right of way over it within certain limits, opened it in a direction not authorized by the reservation, and he was enjoined from using it, it was held that he might make a new designation of the way: *Hart v. Conner*, 25 Conn. 331. And the same principles apply to aqueducts. The selection is left to the owner of the dominant tenement, but he must not make such a selection as would unnecessarily occasion detriment to the servient tenement: 3 Burge's Colonial and Foreign Law, 441. A grant of a right to open a parcel of land, where it may be found necessary for the purpose of laying pipes, and of liberty to keep such pipes therein forever, does not expressly or by implication grant a right to change the location of the pipes after they are once laid: *Chandler v. Jamaica Pond Aqueduct*, 125 Mass. 544. And where a grant has been made allowing pipes to be laid for the purpose of conducting water across the grantor's lands, but without specifying the place or size of pipe, and the grantee has, with the acquiescence of the grantor, once laid the pipe, what was before indefinite and general becomes fixed and certain, and the easement cannot thereafter be changed. Neither can it be exercised in any other place, nor can the size of the pipe be increased: *Onthank v. Lake Shore etc. R. Co.*, 71 N. Y. 194. So where an aqueduct has been laid, and afterwards taken up by the grantor, and the easement has been abandoned for thirty years, the grantee cannot lay a new aqueduct in a new direction over the grantor's land, although the construction of a railroad has made it impossible to lay it in the old place: *Jennison v. Walker*, 11 Gray, 423.

7. *Way of Necessity, Right of Deviation where Way is Obstructed, and Action for Obstruction.*—Where the grantor obstructs a way of necessity, the grantee may go over other parts of the land of the grantor: *Bass v. Edwards*, 126 Mass. 445; *Farnum v. Platt*, 8 Pick. 339; S. C., 19 Am. Dec. 330; *Leonard v. Leonard*, 2 Allen, 543; *Holmes v. Seely*, 19 Wend. 507; but he must do no unnecessary damage: *Leonard v. Leonard*, 2 Allen, 543; *Farnum v. Platt*, 8 Pick. 339; S. C., 19 Am. Dec. 330. The grantee is bound to keep the way in repair, and is not permitted to go *extra viam*, as a traveler upon a public highway is allowed to do when the way is impassable, except, it seems, when the private way is temporarily or accidentally obstructed: *Holmes v. Seely*, 19 Wend. 507. The right to go upon adjoining land, where highway is impassable, is discussed in an extended note to *Campbell v. Race*, 54 Am. Dec. 731-734. The grantee may maintain an action for damages, if the grantor, or those claiming under him, obstruct his convenient use and enjoyment of a way by necessity: *Tudor Ice Co. v. Cunningham*, 8 Allen, 139; *Smiles v. Hastings*, 24 Barb. 44; *O'Brien v. Schayer*, 124 Mass. 211; *Morris v. Edgington*, 3 Taunt. 24; or they may be enjoined from obstructing a passage-way of necessity: *Gerrish v. Shattuck*, 128 Mass. 571.

8. *Way by Necessity is Appurtenant to Land when, and Passes as Incident to Grant when.*—When the grantee's land is wholly surrounded by what had been the grantor's other land, or partly by this and partly that of a stranger, or is inaccessible except through the lands of his grantor or those of a stranger, a way by necessity over the lands of the grantor is appurtenant to the grant, and passes as incident to it: *New York Life Ins. etc. Co. v. Milnor*, 1 Barb. Ch. 353; *Trask v. Patterson*, 29 Me. 499; *Smiles v. Hastings*, 24 Barb.

44; *Brice v. Randall*, 7 Gill & J. 349; *Proctor v. Hodgson*, 10 Ex. 828; *Bass v. Edwards*, 126 Mass. 445; note to *Lawton v. Rivers*, 13 Am. Dec. 747; *Brown v. Burkenmeyer*, 9 Dana, 159; S. C., 33 Am. Dec. 541; *Collins v. Prentice*, 15 Conn. 39; S. C., 38 Am. Dec. 61; *Kimball v. Cochecho R. R.*, 27 N. H. 448; S. C., 59 Am. Dec. 387; *McTavish v. Carroll*, 7 Md. 352; S. C., 61 Am. Dec. 353; *Leonard v. Leonard*, 2 Allen, 543; *White v. Bradley*, 66 Me. 254; *Wiswell v. Minogue*, 57 Vt. 616; but see *infra*, subdivision 9. And this irrespective of the express terms of the grant: *Smyles v. Hastings*, 22 N. Y. 217; *Oliver v. Dickinson*, 100 Mass. 117; *Hollenbeck v. McDonald*, 112 Id. 250. So, if a grantor conveys part of his lands, reserving a part to which there is no access except over the part conveyed away, he will be entitled to a way by necessity over the part so conveyed by him: *Collins v. Prentice*, 15 Conn. 39; S. C., 38 Am. Dec. 61; *Alley v. Carleton*, 29 Tex. 74. And these principles have been applied to a way for lights. Thus, it has been held that if one sell a building, the light necessary to the reasonable enjoyment of it, coming across the grantor's adjoining land, goes with it as an incident to the grant; but it must be necessary light, not that which would be a convenience simply: *White v. Bradley*, 66 Me. 254. As to aqueducts, ways therefor, etc., see *supra*, subdivision 6. Two or more ways of necessity are impliedly included in a grant of lands which are so divided by impassable barriers that the different parts are inaccessible without such ways: *Nichols v. Luce*, 24 Pick. 102; S. C., 38 Am. Dec. 302. A way of necessity, however, extends only to some part of the grantor's lands, not to every part of it: *Brice v. Randall*, 7 Gill & J. 349; *White v. Bradley*, 66 Me. 254. The grantor in a deed of warranty may have a way of necessity over the land granted: *Brigham v. Smith*, 4 Gray, 297; S. C., 64 Am. Dec. 76. And where a way of necessity to part of a debtor's land results from successive levies of execution upon other parts, the land of the creditor whose levy creates the necessity must be burdened with the easement: *Russell v. Jackson*, 2 Pick. 573. But where a parcel of land is sold for a specific purpose and conveyed without reservation, the law will not imply, in favor of the vendor, a right of way of necessity over or through such land inconsistent with the object of the purchase: *Seeley v. Bishop*, 19 Conn. 128. The law will not reserve anything out of a grant in favor of a grantor, except in case of necessity: *Crossley v. Lightowler*, L. R. 2 Ch. App. 486; *Stevens v. Orr*, 69 Me. 323.

9. *Way of Necessity, Conveyance of Estate to Which Such Right is Appendant — Adjoining Lands.*—The conveyance of an estate to which a right of way by necessity is appendant, carries with it the right, and entirely divests the grantor of all interest in it: *Alley v. Carleton*, 29 Tex. 74. In *Pierce v. Selleck*, 18 Conn. 321, it is said to be a general principle, that if a man having two parcels of land, to one of which he has no access except over the other, and he conveys the accessible parcel, reserving the inaccessible one, a right of way to the latter over the former is reserved to the grantor. On the contrary, however, it is held in *Leonard v. Leonard*, 2 Allen, 543, that if the owner of land "bounded on one side by a highway," and on all other sides by lands of other owners, has a prescriptive right of way over one of the adjoining lots, by which he can reach the highway, and sells that portion of his land which is next to the highway, he retains no right of way by necessity over the same. But as to grantees, it has been held that if the owner of a lot "fronting on a highway" conveys the rear part of it, which is surrounded entirely by the land of persons other than the grantee, the latter has a right of way by necessity to the highway over the remaining land of the grantor: *Bass v. Edwards*, 126 Mass. 445; *New York Life Ins. etc. Co. v. Milnor*, 1 Barb. Ch. 353;

Leonard v. Leonard, 2 Allen, 543. On the contrary, however, it is held in *Kuhlman v. Hecht*, 77 Ill. 570, that if a party sells lands not entirely surrounded by his own, but only adjoining the same, the purchaser acquires no right of way, by implication, over the remaining land of the grantor, even though it lies between the land bought and the public highway. But again, in *Leonard v. Leonard*, 2 Allen, 543, it is held, on the other hand, that a deed of land bounded on all sides by lands of other owners passes, as appurtenant, an existing prescriptive right of way over one of the adjoining lots, to other land of the grantor, and a way by necessity over the latter. In *Pierce v. Selleck*, *supra*, it was said that it did not follow that if the grantor afterwards conveyed the inaccessible parcel to a third person, such person would take by force of the conveyance the same right of way. It would not pass as appurtenant to the land. And in *Bass v. Edwards*, *supra*, it was said that the mere fact that the grantor had for a long time used a particular route to the rear land, would not justify the implication that he intended to convey a right to this way, and exclude him from assigning any other practical and convenient way to the highway: Compare *Regan v. Boston Gas Light Co.*, 137 Mass. 37. It is evident that the decisions in this subdivision are in conflict, but no principle now appears that will harmonize them.

10. *Other Matters*. — One tenant in common cannot create an easement, as of a way by necessity, over the common estate, to land sold by him and belonging to himself alone: *Marshall v. Trumbull*, 28 Conn. 183; *Crippen v. Morse*, 49 N. Y. 63. Order in which two parcels of land were conveyed makes no difference in determining whether or not a right of way by necessity is appurtenant to either: *Collins v. Prentice*, 15 Conn. 39; S. C., 38 Am. Dec. 61; *Pinnington v. Galland*, 9 Ex. 1; neither does the fact that such parcels were conveyed by the executors of a deceased owner under a decree of the probate court: *Collins v. Prentice*, 15 Conn. 39; S. C., 38 Am. Dec. 61. A plea which generally describes a way of necessity as such is all that is required: *Bullard v. Harrison*, 4 Maule & S. 391. Thus, where it is described as the way passing "from a certain public highway in said county into, through, over, and along the said close in which," etc., it is sufficient: *Myers v. Dunn*, 49 Conn. 71. Party who claims right of way by necessity must prove that the necessity exists: *Stuyvesant v. Woodruff*, 21 N. J. L. 133; S. C., 47 Am. Dec. 156; and compare *Chase v. Perry*, 132 Mass. 582; *O'Brien v. Schayer*, 124 Id. 211.

WOOD v. FOSTER.

[8 ALLEN, 24.]

DECLARATION AS TO BOUNDARY IS ADMISSIBLE IN EVIDENCE AFTER DECEASE OF ONE WHO MADE IT, WHEN. — Where one in actual occupation of land, under undisputed claim of title, pointed out the limits of his claim, his declaration as to such boundary made at that time is admissible in evidence after his decease, in favor of those who claim under him, on the trial of a question arising subsequently concerning the boundary line of the same tract of land.

TORT for breaking and entering the plaintiffs' close. It appeared on the trial that the plaintiffs and the defendant were the owners of adjoining tracts of woodland. The plaintiffs

contended that the boundary line between them was marked by an old stone wall; but the defendant contended, and introduced evidence tending to show, that the wall had been put there by mistake, and that the true boundary was a straight line from a stake and stones about three rods to the west of the south end of the wall to the north end of it. The land between this line and the wall was the subject of dispute. Defendant claimed title under his father, who died in 1856 or 1857, aged eighty-two years. Defendant and another witness in his behalf were called, and offered to testify that defendant's father, while in possession of the land and upon the same, and exercising acts of ownership, pointed out the western boundary of his land as a line drawn from a stake and stones to a stone wall. This statement was made by defendant's father, according to the time fixed by one of the witnesses, in 1842. The evidence was rejected. Verdict for plaintiffs, and defendant alleged exceptions.

E. W. Kimball, for the defendant.

A. A. Abbott, for the plaintiffs.

By Court, CHAPMAN, J. In *Daggett v. Shaw*, 5 Met. 223, it is said that the declarations of ancient persons, who are deceased at the time of the trial, made while in possession of land owned by them, pointing out their boundaries, on the land itself, are admissible in evidence, when nothing appears to show that they were interested to misrepresent in thus pointing out their boundaries; and it need not appear affirmatively that the declarations were made in restriction of or against their own rights. This doctrine is recognized in *Bartlett v. Emerson*, 7 Gray, 174, and *Ware v. Brookhouse*, 7 Id. 454. It applies to the present case, because it appears that the defendant's father was on the tract when he pointed out the boundary, and it does not appear that any controversy had then arisen respecting his title. Being in actual occupation of the land, under claim of title, he pointed out the limits of his claim. The evidence should have been admitted.

Exceptions sustained.

EVIDENCE OF DECLARATIONS AS TO BOUNDARIES, WHEN ADMISSIBLE after decease of one making them: *Whitney v. Bacon*, 69 Am. Dec. 281; note to *Denning v. Carrington*, 30 Id. 595; *Pike v. Hayes*, 40 Id. 171.

HOSMER v. SARGENT.

[8 ALLEN, 97.]

SALE MAY BE ADJOURNED by sheriff, public officer, or trustee appointed to make it, without giving further notice.

MORTGAGEE, IN EXECUTING POWER OF SALE IN MORTGAGE OF PERSONAL PROPERTY, MAY ADJOURN SALE from time to time, in the exercise of a reasonable discretion, without doing so through the agency of a licensed auctioneer or giving any new notice to the mortgagor.

PENAL STATUTES ARE TO BE STRICTLY CONSTRUED. — Thus, a statute requiring the employment of an auctioneer to make sales at auction, and prohibiting other persons from doing so, applies only to the act of sale, and does not prohibit other persons from appointing the time and place of sale, advertising, giving notice to interested parties, and making adjournments. These acts are preliminary, and constitute no part of the contract or act of sale.

TORT for the conversion of a horse, two wagons, a harness, and a cow. The plaintiff was the owner of the property, and had mortgaged it to defendant, with a power of sale. The plaintiff adjourned the sale because at the appointed time he was able to get only one of the wagons. The adjournments, unless, perhaps, the last one, were made by the defendant, and not the auctioneer. The judge ruled that, as the defendant did not sell the property at a time when it was in his hands, but adjourned the sale over again for two days, that the sale at that time was not a lawful execution of the power contained in the mortgage, and was evidence of a conversion which would authorize the plaintiff to maintain his action. Verdict for plaintiff. Other facts are stated in the opinion.

S. B. Ives, Jr., for the defendant.

D. Saunders, Jr., for the plaintiff.

By Court, CHAPMAN, J. The defendant had a mortgage of the property in question with a power of sale; and the debt being unpaid, he undertook to execute the power of sale. After appointing a time and place of sale, and giving the plaintiff due notice thereof, he adjourned the sale from time to time, and at the time of the last adjournment he employed an auctioneer, by whom the sale was made. The plaintiff contends that these adjournments were unauthorized; and that, as no new notice of the sale was given to him, the sale was void.

But this question was thoroughly discussed in the case of *Richards v. Holmes*, 18 How. 143. That was a bill in equity, to set aside a sale under a deed of trust made to secure the

payment of a note, the deed being in effect a mortgage with power of sale. Mr. Justice Curtis gives conclusive reasons why a trustee should have power to adjourn such a sale; and he remarks that such a sale, regularly adjourned, is, when made, in effect, the sale of which previous notice had been given. If the plaintiff neglected to attend at the time and place first appointed, he was not entitled to further notice. The right to adjourn must, of course, be subject to a reasonable limitation, and the trustee must act in good faith. But no question arises in this case on these points. The objection is simply that no right to adjourn existed.

The right of a sheriff or other public officer to adjourn a sale, as being incident to the power to sell at auction, is settled in Maine, New York, and in this commonwealth. And if a public officer not appointed by the party, and acting independently of him, has such power, there is no reason why a trustee appointed by the party and acting under his express authority should not have it also. In both cases the reasons for its exercise are the same. It enables the seller to prevent the property from being sacrificed, and at the same time to prevent the loss of the labor and expense already incurred in giving notice of the sale.

Another objection urged by the plaintiff is, that though an auctioneer was employed to make the sale, yet he was not employed to make the adjournments. The only reason why it was necessary to employ an auctioneer is, that other persons are prohibited from making sales at auction by Gen. Stats., c. 50, sec. 9. But the statute applies only to the act of sale, and as it is a penal statute, it must be construed strictly. It does not, either in its terms or its spirit, prohibit other persons from appointing the time and place of a sale, advertising, giving notice to interested parties, and making adjournments. These acts are preliminary to a sale, but constitute no part of the contract or act of sale. This objection, therefore, cannot prevail. There being no other objections to the sale than those above stated, judgment must be for the defendant.

Verdict set aside.

EXECUTION SALE, EFFECT OF ADJOURNING: *Coriell v. Ham*, 61 Am. Dec. 136.

ADJOURNMENT OF SALE, NOTICE OF, WHAT REQUIRED: See *Hoffman v. Anthony*, 75 Am. Dec. 701, and extended note thereto 704-713, on notice of sale, what is proper and sufficient.

PENAL STATUTES ARE TO BE STRICTLY CONSTRUED: *Warner v. Commonwealth*, 44 Am. Dec. 114.

THE PRINCIPAL CASE WAS CITED IN *Dexter v. Shepard*, 117 Mass. 485, to the point that a mortgagee has a right, in the exercise of a reasonable discretion, to adjourn a sale from time to time. He is acting, not only in his own right, but also as the attorney or agent of the mortgagor; and although the immediate occasion and purpose of the sale is to enforce the payment of the debt due to himself, he is in fact a trustee for the benefit of all parties in interest. In that fiduciary relation, it is his duty to get the best price for the property that he can, and to take all proper and reasonable precautions that it shall bring its full value. If, in the exercise of a sound discretion, and acting in good faith, he finds it expedient to adjourn the sale, he has a right to do so.

DURANT v. ESSEX COMPANY.

[8 ALLEN, 163.]

DIVIDED COURT, EFFECT OF UPON DECREE OR JUDGMENT. — At early common law, when the judges were equally divided in opinion upon an essential question of law, no judgment would be given; but here the practice is different.

SAME — FINAL DECREE OF SUPREME COURT OF UNITED STATES, RENDERED BY DIVIDED COURT, dismissing a bill in equity after a hearing, is a bar to a subsequent suit in equity, in the state court, where the case originated, for the same cause and between the same parties.

SAME — DECREE RENDERED BY DIVIDED COURT DOES NOT MEAN that they are divided as to the question whether it should be rendered, but merely as to the questions of law involved in it.

SAME — DECREE RENDERED BY DIVIDED COURT IS BINDING ON PARTIES to the suit, and is a bar to another suit for the same cause. Such has always been the effect of a decree dismissing a bill in equity after hearing, when it is not expressed to be dismissed without prejudice.

PRACTICE IN UNITED STATES SUPREME COURT AND IN STATE COURTS OF NEW YORK AND MASSACHUSETTS AS TO RENDERING JUDGMENT WHEN COURT IS DIVIDED. — If a cause is tried before a single judge, and his ruling upon an essential point is excepted to, and the judges are equally divided in respect to it after argument, judgment is commonly rendered in conformity with his ruling.

SAME — IF SINGLE JUDGE BEFORE WHOM CAUSE IS TRIED reserves questions of law for the consideration of the full court, and the judges are equally divided on a point which involves the plaintiff's right to recover, judgment is commonly rendered for the defendant.

SAME — IF CAUSE IS BROUGHT UP FROM LOWER COURT on a question of law by exception or appeal, and the judges are equally divided, the judgment of the lower court is commonly affirmed.

SAME — PRESUMPTION IS STRONG THAT POINT DECIDED BY SINGLE JUDGE has been decided rightly, and it is reasonable in such cases that this presumption should stand.

BILL in equity. The case was reserved for the determination of the whole court, upon facts which are sufficiently stated in the opinion.

C. Cushing and N. W. Hazen, for the plaintiff.

E. Merwin and J. J. Storrow, for the defendants.

By COURT, CHAPMAN, J. The land which is the subject of the present suit is admitted to be the same which was demanded in the case reported in 14 Gray, 447. In that action, which was a writ of entry, the defendants in this suit recovered the legal title, so that it must be assumed to be in them now. The ground of the decision was, that the defendants were entitled to the land by virtue of conveyances from the plaintiff. The opinion is also expressed that they are entitled to it by virtue of a deed from his assignee in insolvency, and that his equitable claims are barred by a decree in a suit in equity rendered against him in the United States court. But it is remarked that, if he has any equitable interests, they must be tried by a suit in equity, and cannot be regarded in an action at law. The present suit is brought to enforce his alleged equitable claims to the property. The bill alleges, in substance, that the land was owned and possessed by him, with a paper-mill and machinery thereon; that he was carrying on business in the mill; that he made a mortgage of the property to Jesse Sargeant; that Sargeant assigned his mortgage to Stephen Barker; that Barker agreed, for a certain consideration, to convey the property to the plaintiff; that he negotiated a sale to Larkin Thorndike, which was given up, and a contract was made between him and Daniel Saunders, Samuel Lawrence, and John Nesmith, which is set forth, being, in substance, an agreement that he should make a conditional deed of the land to them, and that they should execute a certain bond to him. It is then alleged that he made the deed, but that they did not make the bond; that they acted in behalf of the Essex Company; that they afterwards decided not to take the land from him; that they took a deed from Barker, conveyed their title to two of their associates in the Essex Company, and refused to execute their agreement with the plaintiff; and that the company brought the action above referred to, and obtained the legal title and possession of the land, and have sold portions of it, and are about to sell other portions. The bill prays that the deeds under which the defendants hold the land may be declared void, a reconveyance to the plaintiff decreed, and an injunction granted against further sales.

The defendants plead in bar that the plaintiff brought his bill in equity for the same cause of action in the circuit court

of the United States for the district of Massachusetts, in which he sought the same relief, in substance, that he seeks in this bill; that answers were filed to said bill, to which answers the plaintiff filed a replication; that testimony was taken and a hearing was had; that certain relief was decreed to him, which he declined to accept; that a further hearing was had, upon which his bill was decreed to be dismissed; that he appealed to the supreme court of the United States; that his appeal was heard and argued at Washington, and thereupon it was decreed that the final decree of the circuit court, dismissing his bill, should stand affirmed, with costs for the defendants; that upon the mandate of the supreme court being filed in the circuit court, the plaintiff moved that his bill might be dismissed without prejudice, but that the motion was denied, and it was decreed that execution should issue against him for costs.

The defendants further plead in bar their judgment in the writ of entry above mentioned. They also file an answer denying the alleged fraud.

The plaintiff contends that neither the decree of the United States court nor the judgment in the writ of entry is a bar to this suit. He files a copy of the record of the decree entered in the supreme court of the United States, which is as follows:—

“This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Massachusetts, and was argued by counsel. On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said circuit court in this cause be, and the same is hereby, affirmed, with costs. By a divided court.”

The plaintiff's counsel properly admit in their argument that the suit above mentioned was for the same cause of action with the present suit, but contend that there was no decree entered in it which can be a bar to the present suit. The objection which they make to the decree is, that it purports to be made by a divided court.

In the English courts of common law, it was the early practice that when the judges were equally divided in opinion upon an essential question of law, no judgment should be given: *Proctor's Case*, 12 Coke, 117. But it has not been so in this commonwealth. If a cause is tried in this court before a single judge, and his ruling upon an essential point is ex-

cepted to, and the judges are equally divided in respect to it after argument, judgment is commonly rendered in conformity with his ruling. If he reserves questions of law for the consideration of the full court, and the judges are equally divided on a point which involves the plaintiff's right to recover, judgment is commonly rendered for the defendant. If a cause is brought up from a lower court on a question of law by exception or appeal, and the judges are equally divided, the judgment of the lower court is commonly affirmed. In such cases the decision of the court relates to the questions of law which are raised, and not to the rendition of a final judgment. There is an agreement that it is expedient to render the judgment, and thus finish the litigation. It is expedient in respect to the interests of the public, and it is often highly so in respect to the interests of the parties. There is also a strong presumption that a point decided by a single judge has been decided rightly, and it is reasonable in such cases that this presumption should stand. In New York the practice is similar to ours: *Bridge v. Johnson*, 5 Wend. 342; *Morse v. Goold*, 11 N. Y. 281 [62 Am. Dec. 103]. It is similar in the United States court: *Etting v. Bank of United States*, 11 Wheat. 59. The judgment of that court in the present case is an authority to the same point. The record has all the elements of a final decree. It purports to order, adjudge, and decree that the decree of the circuit court be affirmed, with costs. In its substance it would not have been different if the judges had agreed in every point unanimously. We do not understand the statement, that it was rendered by a divided court, to mean that they were divided as to the question whether it should be rendered, but merely as to the questions of law which had been involved in it. The statement was not intended to invalidate it as a decree; but to affect its value as a precedent in other cases, and to furnish a reason for not publishing an opinion of the court. But it was designed to be binding on the parties, and it is so. One of its effects is that it is a bar to another suit for the same cause. Such has always been the effect of a decree dismissing a bill in equity, after hearing, when it is not expressed to be dismissed without prejudice: See *Foot v. Gibbs*, 1 Gray, 412. The present suit being barred by that decree, it is not necessary to notice the other points that have been presented.

Bill dismissed, with costs for defendants.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: Judgments are *ex proprio vigore* conclusive. *Judicia sunt tanquam juris dicta, et pro veritate accipiuntur*. This has been expressly held of judgments *ex necessitate* of a divided court; which, even in England, have weight as authority: *Lathrop v. Knapp*, 37 Wis. 313, where an affirmance, by a divided court, of an order overruling the demurrer to a complaint, was held to be *res adjudicata*, with the same effect as if the decision had been by a unanimous court. If the supreme judicial court of Massachusetts are equally divided in opinion upon a question presented on a bill of exceptions, the exceptions are overruled; and if, in such a case, exceptions have been overruled, no exception lies to the refusal of a single judge to postpone the entry of judgment, and to allow the case to go again before the whole court, on a motion for a re-argument: *Shannon v. Shannon*, 10 Allen, 249. There is no essential difference between the effect of a decree in equity and of a common-law judgment with respect to the dismissal of a cause on its merits. A bill regularly dismissed upon the merits, where the matter has been passed upon and the dismissal is not without prejudice, is a bar to future proceedings, either in equity or at law. And under similar circumstances, a judgment at law is a bar to future proceedings in equity. By the doctrine of *res adjudicata*, a cause of action once finally determined, without appeal, between the parties, on the merits by any competent tribunal, cannot afterwards be litigated by new proceedings either before the same or any other tribunal. But no such effect is attributable to a decree dismissing a bill for want of jurisdiction, failure of prosecution, want of parties, or any other cause not involving the essential merits of the controversy: *Foster v. The Richard Busted*, 100 Mass. 412. So where a widow, by an antenuptial contract made with her husband, upon a consideration "understood between the parties," had renounced all claim upon his estate; and a bill in equity brought against her by the executors of that estate, to enforce the contract and to have her enjoined from proceeding at law against the estate, had been dismissed, with costs, upon a finding that the contract was made in consideration of an unperformed promise by the husband to make for her an adequate provision as widow, — it was held, in an action by the executors against her for a breach of the contract in having proceeded at law against the estate, that the decree in equity was conclusive evidence against the maintenance of the action: *Blackinton v. Blackinton*, 113 Id. 234. Durant also commenced a suit on two different occasions in the circuit court for the district of Massachusetts against the Essex Company, and appealed to the supreme court of the United States, where the questions involved were decided as follows: 1. A decree dismissing a bill absolutely, on the merits, is a final determination of the controversy, and constitutes a bar to any further litigation of the same subject between the same parties; 2. A judgment of affirmance by a divided court is as effectual as if all the judges had concurred therein: *Durant v. Essex Co.*, 7 Wall. 107; *Durant v. Essex Co.*, 101 U. S. 555. The case last cited contains a statement of facts concerning both suits in the circuit court and appeals therefrom to the supreme court of the United States.

BARRY v. CITY OF LOWELL.

[8 ALLEN, 127.]

IT IS GENERAL RULE AT COMMON LAW THAT NO ACTION LIES AGAINST TOWN for an injury sustained through any defect in a highway.

ACTION LIES AGAINST CITY FOR FAILURE TO KEEP ITS COMMON SEWER IN REPAIR, where it forces water back upon private estates and prevents water from being discharged therefrom, if damage is caused thereby, and the city has assumed to regulate the whole subject by ordinance requiring the particular drains from private estates to be entered into the main and common drains of the city, and to be laid out and constructed under the direction of the board of aldermen.

NO ACTION LIES AGAINST CITY FOR FAILURE TO KEEP PUBLIC SEWER AND CESSPOOL IN REPAIR, whereby waste water accumulates and flows into the cellar of a neighboring house, where the owner of the private estate has not been required to conform his drainage to that which the city has provided for public purposes, and is not, in fact, connected by a drain with the public sewer. Such owner must protect himself or suffer the consequences.

TORT to recover damages sustained from a flow of water into the cellar of the plaintiff's house. The public sewer built through the street upon which the plaintiff's house was situated was not laid deep enough to drain the plaintiff's cellar, and no drain led from the cellar to the sewer. Opposite the plaintiff's house stood a cesspool, which was frequently obstructed by dirt, gravel, snow, and ice. These obstructions prevented the water from passing freely through the same; and the water in such cases flowed over into the plaintiff's cellar. But had the sewer and cesspool been free from obstruction the water would all have passed through them. Plaintiff himself, on several occasions, removed the obstructions, and complained to the authorities of the city. Verdict for the plaintiff by consent.

T. Wentworth, for the plaintiff.

A. R. Brown, for the defendants.

By Court, MERRICK, J. The damage for which the plaintiff seeks in this action to recover compensation was caused by the overflow onto his land and into the cellar of his dwelling-house, in consequence of the inattention and negligence of the defendants in keeping open and in proper repair, one of their main drains and common sewers, of the surface water collected on one of the highways in the city. It is a general rule that no action lies at common law against a town for an injury sustained through any defect in a highway: *Mower v.*

Leicester, 9 Mass. 247 [6 Am. Dec. 63]; *Sawyer v. Northfield*, 7 Cush. 494. And no remedy is given by any statute for such an injury as is described in the declaration. But the plaintiff relies upon the decision in the case of *Child v. Boston*, 4 Allen, 41, in which it was held that the defendants, upon the facts disclosed in that case, were liable to the plaintiff for the damage occasioned by surplus water forced back upon the plaintiff's land, by suffering their common sewer to be stopped up and obstructed, so that no water could pass through or be discharged from the same. The reason why they were held liable in that case is, that the city ordinance requires all the particular drains from private estates to be entered into the main and common drains of the city, and to be laid and constructed under the direction of the board of aldermen. The owner of a private estate has therefore in such case no means of protecting it against the accumulation of water by the fall of rain or the melting of snow, if the city suffers its common sewer to be out of repair or negligently stopped up and obstructed. As the city assumes to regulate the whole subject, and compels all individuals to conform to and comply with their ordinances, it results by necessary implication that they make themselves liable for whatever mischief or injury necessarily results from any negligence or omission of duty on their part.

But in the present case the defendants never by any act or ordinance required the plaintiff to draw the water from his land, or to make his private or particular drain open into their common sewer, but left him to manage his estate as he should think most for his own interest or advantage. He never connected or sought to connect any drain from his land with the common sewer of the city; and in fact he could not effectually have done so without alteration of the estate, for it appears that his cellar was below the lowest part of the common sewer.

Since the plaintiff was not required to conform his drainage to that which the city had provided for public purposes, and had in fact never made use in that way of the common sewer which they had constructed, he had a right to prevent the overflow of water from it onto his own land by erecting such obstructions there as were necessary for that purpose. But if he omitted to do so, and sustained damage in consequence of the failure of the defendants to keep their own works in good order or in due repair, he can maintain no action therefor,

because none is provided for by statute, and because by the use of lawful means he might himself have prevented the injury. This principle was fully determined in the case of *Flagg v. Worcester*, 13 Gray, 601. In that case it appeared that the defendants knowingly and intentionally diverted the water from the highway in such manner that it necessarily fell and was discharged onto the plaintiff's land; yet it was held that an action to recover the damages occasioned by it could not be maintained. It is obvious that the neglecting to adopt suitable means to prevent the occurrence of particular injurious acts cannot be more culpable than the intentional doing of the acts themselves; and that if the latter would not afford a legal cause of action, none can be maintained for any of the consequences resulting from such alleged negligence.

The verdict, which was for the plaintiff, is to be set aside, and judgment is now to be entered for the defendants.

LIABILITY OF CITIES, TOWNS, ETC., FOR IMPROPERLY CONSTRUCTING SEWERS, AND FAILING TO KEEP THEM IN REPAIR: See cases cited in note to *Wilson v. Mayor of New York*, 43 Am. Dec. 724; note to *City of Buffalo v. Holloway*, 57 Id. 554; note to *City of Madison v. Ross*, 54 Id. 483; *City Council v. Gilmer*, 70 Id. 562. The liability of municipal corporations with respect to sewers and surface water is discussed at length in the note to *Perry v. City of Worcester*, 66 Id. 435. City is liable for flooding lot by improper construction of culvert, and by not making it large enough, where it authorizes the construction of such culvert, for the purpose of carrying away surface water: *Rochester White Lead Co. v. City of Rochester*, 53 Id. 316, and note thereto 320, on liability of municipal corporations for negligence of agents in performance of work authorized by law.

THE PRINCIPAL CASE WAS CITED in each of the following authorities, and to the point stated: No action lies at common law against a town for damages sustained through a defect of the highways in such town: *Stilling v. Town of Thorp*, 54 Wis. 532. No action lies for the turning of mere surface water from one's own land, by means of erections thereon authorized by law, upon the land of another: *Greeley v. Maine Cent. R. R. Co.*, 53 Me. 203. Within the limits of a highway, the officers of a town may construct drains and culverts, and if the surface water, after flowing in them for some distance, turns upon the land of an adjoining proprietor, no action lies for the damage thereby occasioned: *Turner v. Inhabitants of Dartmouth*, 13 Allen, 293. If a city constructs a drain, every individual interested in the drain has a right to rely upon the drain operating to the extent of its capacity, and if the city, through negligence, allows the drain to become obstructed so that injury results to some private individual, the city, as a rule, becomes liable. But there is no principle of law that gives any party a right to demand or expect that the drain should operate to an extent beyond its capacity: *City of Atchison v. Challise*, 9 Kan. 612. So, where the water of a stream becomes polluted because of city sewers emptying into it, so that a riparian proprietor cannot use it in his business according to his usual custom, he cannot recover against the city for the pollution so far as it is attributable to the plan of

sewerage adopted by the city; but he can recover for it so far as it is attributable to the improper construction or unreasonable use of the sewers, or to the negligence or other fault of the city in the care or management of them: *Merrifield v. City of Worcester*, 110 Mass. 220. The principal case was summarized in *Emery v. Lowell*, 104 Id. 17; *Roll v. City of Indianapolis*, 52 Ind. 558; and cited indefinitely in *Pettigrew v. Village of Evansville*, 25 Wis. 232.

WILSON ET UX. v. CITY OF CHARLESTOWN.

[8 ALLEN, 187.]

NO ACTION AGAINST TOWN TO RECOVER FOR INJURIES occasioned by falling upon the ice on a dangerous sidewalk can be sustained by one who knows it to be dangerous, by means of ice upon it, and who voluntarily attempts to pass over it, though the town is bound to keep the way in repair. The burden is on the plaintiff to show the use of ordinary care.

TORT to recover for a personal injury sustained by Wilson's wife, in consequence of a defective highway. The facts were agreed upon, and the judge below ruled that the plaintiffs were not entitled to recover. Verdict for defendants, and plaintiffs alleged exceptions.

J. F. Pickering, for the plaintiffs.

J. Q. A. Griffin and C. Robinson, Jr., for the defendants.

By Court, CHAPMAN, J. It is well settled that the burden was on the plaintiffs to prove that Mrs. Wilson used ordinary care. The report of the case states that the sidewalk was covered with ice, so as to be very slippery and dangerous; that she had passed over it just before in company with a friend, and they both remarked upon its dangerous condition. It thus appears that it was dangerous, and that she knew it to be so. In returning from the house to which she went, it is stated that she attempted to pass to Union Street over the slippery sidewalk, and when she had proceeded about half-way to Union Street she slipped and fell, receiving the injury for which the action is brought. But in all this there is nothing that affirms or indicates the exercise of care. There was no evidence to submit to the jury on that point. The fact that the street in front of the sidewalk, and the sidewalk on the opposite side of the street, were in such condition that they could have been used safely and conveniently, which was shown, tended to prove a want of care on the part of the female plaintiff. It is settled that if a person knows a way to be

dangerous when he enters upon it, he cannot, in the exercise of ordinary prudence, proceed and take his chance, and, if he shall actually sustain damage, look to the town for indemnity: *Horton v. Ipswich*, 12 Cush. 488. The case therefore presents not only an entire absence of evidence tending to prove care, but strong evidence of carelessness. The defendants were legally entitled to the verdict which was taken in their favor: *Todd v. Old Colony and Fall River R. R.*, 3 Allen, 21 [80 Am. Dec. 49]; *Denny v. Williams*, 5 Id. 1.

Exceptions overruled.

PARTY INJURED BY DEFECT IN HIGHWAY MUST PROVE DUE CARE AND PRUDENCE, or he cannot recover in an action against a town for such injury, as culpable negligence or want of ordinary care is a defense to such action: See cases cited in note to *Hubbard v. City of Concord*, 69 Am. Dec. 535. As to care necessary to avoid injury from defect in highway, see note to *Hanlon v. Keokuk*, 74 Id. 278. As to liability of municipal corporations for damages from defective highways, etc., see cases cited in note to *City of St. Paul v. Seitz*, 74 Id. 762.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: If the whole evidence introduced by the plaintiff, in an action for negligence, has no tendency to show care on his part, but on the contrary, shows that he was careless, it is the duty of the court to direct the jury, as matter of law, to return a verdict for the defendant: *Warren v. Fitchburg R. R. Co.*, 8 Allen, 230. In *Dewire v. Bailey*, 131 Mass. 172, the fact that a person noticed, on entering a building, that there was ice and snow on a plank sidewalk in front of the door, was held not to be conclusive evidence, in an action by him against the owner of the building for an injury sustained on his way out of the building, in consequence of such snow and ice, that he was not exercising due care in attempting to pass over the sidewalk. It was contended by the defendant in that case that the law in respect to the exercise of due care is not the same in actions where the injuries are received on entering or leaving buildings which the plaintiff has expressly or impliedly been invited to enter by the defendant, who, as owner or occupant, is under an obligation towards him to keep them in a safe condition, as in actions where the injuries are occasioned by defects in public highways. The principal case was cited in support of this distinction, but the court said: "It is difficult to see any ground for this contention. That contributory negligence on the part of the plaintiff will prevent him from maintaining his action, is a common-law principle applicable to both of these classes of actions, and to many others, and is independent of the statutes which impose a liability on towns for injuries received through defects or want of repair in highways. Those statutes in this commonwealth may affect the degree of care required of the defendant, but do not touch the degree of care required of the plaintiff. The same conduct of the plaintiff, under the same circumstances, must, under the rule of the common law, be held to be contributory negligence in all actions to what that rule applies. Nor do we find that any such distinction is supported by authority." The principal case was held not to be an authority for the distinction suggested.

HACKETT v. KING.

[8 ALLEN, 144.]

PRIOR DECLARATIONS OF PERSON ARRESTED ON CRIMINAL CHARGE ARE COMPETENT EVIDENCE AGAINST HIM IN CIVIL SUIT, WHEN. — In a controversy as to whether a release of personal property has been obtained through duress, by means of an arrest upon a criminal charge, the declarations of the person arrested, made prior to the filing of the complaint, are competent evidence against him for the purpose of showing probable cause for the charge.

EXCEPTIONS SHOWING THAT INCOMPETENT DECLARATIONS WERE ADMITTED IN EVIDENCE WILL NOT BE SUSTAINED UNLESS they also show what such declarations were.

EVIDENCE THAT ONE HAS FOR YEARS BEEN LIVING BEYOND HIS APPARENT MEANS IS ADMISSIBLE as tending to confirm other evidence of his dishonesty in appropriating the property of his employer.

TORT for the conversion of a note, horse, and other property, valued at five hundred dollars. Defendant claimed the property under a release or bill of sale from the plaintiff. Plaintiff replied that the release was obtained from him through duress and fraud, by means of arrests upon three complaints and warrants charging him with larceny of money of the defendant, who was his employer. Defendant was allowed to testify, under objection, to conversations as stated in the opinion. The defendant's statements to the city marshal, in reference to the suspected larceny, were made in the absence of plaintiff. But they were admitted, as tending to prove probable cause. Defendant was then allowed to prove, under objection, the plaintiff's habits of living and expenditures for four years, while he was in the defendant's employment, as tending to show that he would not be likely to have had so much as five hundred dollars, if he had obtained it honestly. Verdict for defendant, and plaintiff alleged exceptions.

R. B. Caverly and A. R. Brown, for the plaintiff.

D. S. Richardson and G. F. Richardson, for the defendant.

THE COURT. Most of the questions raised by this bill of exceptions were decided when the case was before us at an earlier stage: *Hackett v. King*, 6 Allen, 58. The only points now argued which are not disposed of by the decision then made, or which are not rendered immaterial by the verdict, are these:—

1. The defendant was permitted, against the plaintiff's objection, to state conversations which he had with the plaintiff

prior to the complaints, relating to acts done tending to show probable cause for the complaints. The nature of the proof is clearly unobjectionable, being the plaintiff's own statement of the facts; and the fact of probable cause for the complaints has an important bearing upon one of the principal issues made to the jury, namely, whether the prosecution was instituted in good faith, or as a means of compelling the payment of the defendant's demand.

2. The defendant was also permitted to state what he told the city marshal when he complained to him against Hackett. This was certainly not competent evidence of the truth of anything which the statement contained. Whether it would not be admissible as showing that the marshal had good cause to obtain the warrants, and that the defendant made a fair and full statement of the facts as they were known to him, would certainly deserve consideration. But the exceptions do not show what the statements were which the defendant gave in evidence, nor that they were such as, whether admissible or not, would affect the case in any manner unfavorably to the plaintiff. There is therefore no sufficient ground for disturbing the verdict upon this point: *Burghardt v. Van Deusen*, 4 Allen, 374.

3. The admission of evidence, that the plaintiff was living at a rate of expenditure far beyond his apparant means, as tending to confirm evidence of dishonesty in appropriating the property of his employer, is sanctioned by the case of *Boston and Worcester R. R v. Dana*, 1 Gray, 83.

Exceptions overruled.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: It is not the duty of a presiding judge to rule on those matters foreign to the issue, which often become the subject of debate between counsel at the bar, or to give instructions upon abstract propositions: *Fish v. Bangs*, 113 Mass. 126. An exception to a question to a witness will not be considered, which does not show how the question was answered, or that the answer was in some way unfavorable to the party excepting: *Buxton v. Somerset Potters' Works*, 121 Id. 448; *Kershaw v. Wright*, 115 Id. 367. Bill of exceptions must show that evidence excluded was material: *Burke v. Savage*, 13 Allen, 409. Irregular admission of evidence is no ground for exception, unless it appears that prejudice results therefrom: *Kingman v. Tirrell*, 11 Id. 99.

**HUNT v. LOWELL GAS LIGHT COMPANY. HUNT
ET UX. v. LOWELL GAS LIGHT COMPANY.**

[8 ALLEN, 169.]

**ESCAPE OF GAS, CAUSING INJURY TO HEALTH, EVIDENCE ADMISSIBLE WITH
RESPECT TO.** — In an action against a gas-light company to recover damages for an injury to the plaintiff's health, caused by an escape of gas from the main pipe in a public street, which passed therefrom through various sewers and drains into the cellar of the house, and thence into the house occupied by the plaintiff, evidence is competent to show that all the other persons living in the same house, who had been in good health before the time complained of, afterwards became ill, for the purpose of showing the effect of the gas upon others who inhaled it at the same time with the plaintiff.

SAME — EVIDENCE THAT INMATES OF ANOTHER HOUSE WERE MADE SICK, in consequence of inhaling gas that escaped from the same defect in the defendants' pipes, is not admissible for plaintiff in an action to recover for injuries caused by the escape of gas into his own house. The evidence must be limited to the effect of the gas upon those who have in common, and under similar circumstances, inhaled it.

**GAS-LIGHT COMPANY IS EQUALLY LIABLE FOR INJURY CAUSED BY ESCAPE
OF GAS** from the main pipe in a public street, and passing therefrom through various sewers and drains into the plaintiff's house, whether the injury was caused by inhaling gas of the defendants, or other gases from the sewers and drains which it set in motion, provided the plaintiff was not, and the defendants were, guilty of negligence. The defendants' negligence in such a case is as much the proximate cause of the injury as if their own gas had occasioned it.

FORM OF QUESTIONS TO EXPERTS is not regulated by any exclusive formula. Any question is proper which will elicit their opinions as to matters of science or skill which are in controversy, and at the same time exclude their opinion as to the effect of the evidence in establishing controverted facts. But if it requires the witness to draw a conclusion of fact, it should be excluded.

TORT against a gas-light company for an injury to the health of plaintiffs, caused by the inhalation of gas which escaped from the pipes of defendants. The two actions were tried together. The plaintiffs had been residents of New Hampshire, but came to the house of Aaron Hunt, in Lowell, to live, and remained there for nine days. Defendants had a main pipe laid in a street near Hunt's house, for the purpose of distributing illuminating gas throughout the city. At the time complained of, there were two large sewers in the same street, which were built by the city, with loose stones. There was a private drain, covered with uncemented flat stones, and built after the defendants had laid their gas-pipe, leading from Aaron Hunt's cellar to one of these sewers, and a sink spout leading from the kitchen into the drain in the cellar. It was con-

tended by the plaintiffs that the gas escaped from the main pipe into one of the large sewers, and thence passed through the drain and up the sink spout into the kitchen. There was no gas-pipe in the house. The plaintiffs became ill, returned home, and were sick there for several weeks. The plaintiffs were allowed to prove, against the defendants' objection, that up to that time the family of said Aaron had been in perfect health, and that immediately or soon after the escape of the gas into the house every member of the family became seriously sick; but no evidence of the particulars of the sickness of any of them was admitted. The plaintiffs called three physicians, who heard the testimony on the part of the plaintiffs, which was not conflicting, and asked each of them this question: "Having heard the evidence, and assuming the statements made by the plaintiffs to be true, what in your opinion was their sickness, and do you see any adequate cause for the same?" Defendants objected, but the question was allowed, and the witnesses answered that "their sickness was of a low typhoid type, and that the breathing of gas, as stated by them, at the house of Aaron Hunt, was the cause of it." Verdict for plaintiffs, and defendants alleged exceptions. The instruction excepted to appears in the opinion.

J. G. Abbott and W. P. Webster, for the defendants.

D. S. Richardson and A. R. Brown, for the plaintiffs.

By Court, CHAPMAN, J. The plaintiffs were visitors in the family of Aaron Hunt at the time when the defendants' gas escaped into the house, and they were permitted to offer evidence that Aaron Hunt and his family had been in perfect health up to the time when the gas began to escape into their house, and that immediately, or soon after, every member of the family became seriously sick. The admission of this evidence is excepted to. But evidence of this character was held to be admissible in the case of Aaron Hunt against these defendants: 1 Allen, 344. The plaintiffs were not allowed to give evidence of the particulars of the sickness of any one of these persons; and it is objected that if the evidence was admissible to any extent, the particulars should have been inquired into. But the sickness of these persons is a collateral fact, and is admissible merely for the purpose of showing the nature of the gas which came into the house, to the influence of which all the inmates were subjected alike. Evidence that the inmates of another house were made sick in consequence of inhaling

the gas that escaped into their house from the same defect in the defendants' pipes, has been held to be inadmissible: *Emerson v. Lowell Gas Light Co.*, 3 Allen, 410. The evidence should be limited to the effect of the gas upon those who have in common, and under similar circumstances, inhaled it. How far the plaintiff shall be permitted to go into particulars in offering such evidence, should depend somewhat on the circumstances of the case, and must, within reasonable limits, be left to the discretion of the presiding judge. If it falls short of proving that the gas caused the sickness of the other persons, it amounts to nothing. But it might be very unreasonable to permit the case to branch out into several collateral issues on such a point. We see no reason to think that the evidence was unreasonably restricted.

The next exception is to the instruction given to the jury, that whether the plaintiffs were made sick by the defendants' gas alone, or by the gas generated in the same drain through which it passed, if carried by the defendants' gas into the house, the defendants were equally liable, provided the jury should find that the plaintiffs were not guilty of negligence, and that the defendants were guilty of negligence.

This instruction was clearly right. If, through the negligence of the defendants, a current of their gas was set in motion, and in its course through the sewer and drain it took up other gases which were noxious and carried them into the house, and the plaintiffs were made sick thereby, the defendants' negligence was as much the proximate cause of the injury as if their own gas had occasioned it. It would be like the case of a mill-owner who should negligently suffer his dam to give way, whereby the meadow of his neighbor below him is overflowed. If the flood should in its course take up stones and gravel, and carry them upon the meadow, the mill-owner would be liable, as well for the damage caused by the stones and gravel, as for the damage caused by the water, on the ground that the whole injury was alike the proximate consequence of his fault.

The third exception is to the question put to the experts, and the answer thereto. The form of question stated by Shaw, C. J., in *Woodbury v. Obear*, 7 Gray, 467, is not to be regarded as an exclusive formula. It is put by way of example, and is well adapted to all cases where the evidence is conflicting or complicated. The object of all questions to experts should be to obtain their opinion as to the matter of skill or science

which is in controversy, and at the same time to exclude their opinions as to the effect of the evidence in establishing controverted facts. Questions adapted to this end may be in a great variety of forms. If they require the witness to draw a conclusion of fact, they should be excluded. The question put in *Sills v. Brown*, 9 Car. & P. 601, was of this character, and was rightly excluded. But where the facts stated are not complicated, and the evidence is not contradictory, and the terms of the question require the witness to assume that the facts stated are true, he is not required to draw a conclusion of fact. In the present case, the question allowed to be put does not seem to us to require of the witnesses anything more than a scientific opinion; and we do not understand the answer to include anything more than this.

Exceptions overuled.

ACTIONS AGAINST GAS-LIGHT COMPANIES FOR INJURIES CAUSED BY ESCAPE OF GAS, AND EVIDENCE THEREIN: See *Holly v. Boston Gaslight Co.*, 69 Am. Dec. 233. As to public duty of gas companies, see *Shepard v. Milwaukee Gas Light Co.*, 70 Id. 479, and extended note thereto 485-489.

EXPERT TESTIMONY: See extended note to *Hammond v. Woodman*, 66 Am. Dec. 228-246.

THE PRINCIPAL CASE WAS CITED in *Hand v. Inhabitants of Brookline*, 126 Mass. 326, to the point that an expert who has heard so much of the testimony of a previous witness as is material to the subject-matter of the inquiry may be interrogated thereon; in *Miller v. Smith*, 112 Id. 475, that a witness having the requisite knowledge and experience may always be examined by hypothetical questions, even if he has not seen the particular subject to which the trial relates, and has not heard all the other evidence given in the case; and in *Shepard v. Ashley*, 10 Allen, 543, that evidence must be confined to the points in issue, and that evidence which raises collateral issues ought to be carefully excluded.

WARREN v. FITCHBURG RAILROAD COMPANY.

[8 ALLEN, 227.]

PLAINTIFF IN ACTION FOR NEGLIGENCE CANNOT RECOVER UNLESS HE WAS HIMSELF USING DUE CARE at the time he received the injury, even if the carelessness of the defendants occasioned it. And the burden of proof is upon him to show that he used such care.

VERDICT MAY BE DIRECTED FOR DEFENDANT if the whole evidence introduced by the plaintiff has no tendency to show care on his part, but, on the contrary, shows that he was careless.

FACTS AS TO NEGLIGENCE WHICH COURT CANNOT RIGHTFULLY WITHDRAW FROM CONSIDERATION OF JURY. — Crossing a railroad track without looking to see if a train is coming is not conclusive proof of a want of care, where it appears that there is a double track, that the person injured had

just bought a ticket at a station for a train which was to pass upon the farther track, and that the station agent said to him, "The train is coming; we will cross over."

MERE PURCHASE OF RAILROAD TICKET DOES NOT MAKE PASSENGER OF BUYER; but if he is passing from the office or place of business where the purchase was made to the train, to take his seat in the cars, on the premises belonging to the company, connected with the railroad, and under the direction of the company's agent, and given to him as a passenger with whom the company have made the contract for conveyance, which the purchase of the ticket creates, he is to be considered as a passenger, and entitled to the rights of a passenger while so passing.

PURCHASERS OF TICKETS ARE BOUND TO COMPLY WITH ALL REASONABLE RULES AND ORDERS OF RAILROAD COMPANY or their agents, as much when going to the cars from the station-house, or from the cars to a place of safety beyond the railroad track, as they are when actually on board the train, and while the transit continues.

CARE IMPOSED UPON CARRIERS OF PASSENGERS FOR HIRE. — A railway company is bound to use the utmost care and diligence in providing for passengers a safe and convenient way and manner of access to its trains, and in preventing the interposition of any obstacle or obstruction which would unreasonably impede them or expose them to harm while proceeding to take their seats in the cars, in order to prevent those injuries which human care and foresight can guard against.

TORT to recover damages for a personal injury received by the plaintiff, in consequence of being run over by the defendants' locomotive engine. It appeared that plaintiff, at Somerville station, on the afternoon of August 7, 1854, purchased a ticket for Boston, and waited in the station for the arrival of the train from Lexington, in which he was to be carried. There were two tracks in front of the station, and the train from Lexington was to come down upon the track which was farthest from the station. When the whistle was heard, as this train was approaching the station, the station agent said to the plaintiff: "The train is coming; we will cross over." The agent and another passenger then did cross over to the platform upon the other side of the track, and reached there before the train arrived. The plaintiff immediately followed them, but did not come out of the station onto the platform in front of it until the train had arrived and stopped. When he was about to step upon the rail of the track nearest to the station, he was struck by the engine of a freight train from Boston, and received the injury for which suit was brought to recover damages. The engineer of the freight train testified that it was going at the rate of nine or ten miles an hour, and that the whistle was blown, and the bell rung, in the manner usual when approaching the station. The plaintiff testified that when he went across the track nearest the station, he

looked to see where he should get into the cars, and as he was stepping from the platform, in front of the station, he saw the train coming from Boston; that instantly afterwards the sound of the whistle struck his ear; that the train was then twenty or thirty feet from him; that he had not time to save himself; that he had no intimation whatever that the train from Boston was coming; that he did not recollect that he looked towards Boston at any time after he came out of the station, until he was stepping onto the rail of the track; and that on the outside of the platform he could see an approaching train at a distance of thirty or forty rods. But there was other evidence to show that a train coming from Boston could be seen from any part of the platform at a much greater distance. After plaintiff's evidence was in, the defendants requested the court to rule that the plaintiff, upon his own testimony, which was not contradicted or varied, had not proved that he was in the exercise of due care at the time of the occurrence of the injury, and contended that it ought to be determined, as a matter of law, that he was not in the exercise of due care. But the judge would neither so rule, nor order a verdict for the defendants. The evidence on both sides all being in, and there being nothing to contradict or vary the testimony of the plaintiff that he had not looked down the track towards Boston before stepping upon the track, in season to avoid the approaching train, the defendants renewed their motion, which was overruled. The nature of the instructions and exceptions thereto appear in the opinion. Verdict for the plaintiff, with damages in the sum of \$5,750. Defendants alleged exceptions.

J. G. Abbott and H. C. Hutchins, for the defendants.

G. A. Somerby and S. B. Hahn, for the plaintiff.

By Court, HOAR, J. The plaintiff could not recover unless he was himself using due care at the time when he received the injury, even if the carelessness of the defendants occasioned it. And the burden of proof was upon him to show that he used this care. So much is clearly settled.

In several recent cases it has been held that if the whole evidence introduced by the plaintiff has no tendency to show care on his part, but, on the contrary, shows that he was careless, it is the duty of the court to direct the jury, as matter of law, to return a verdict for the defendant: *Lucas v. New Bedford and Taunton R. R.*, 6 Gray, 64 [66 Am. Dec. 406]; *Gahagan v. Boston and Lowell R. R.*, 1 Allen, 187 [79 Am. Dec. 724];

Todd v. Old Colony and Fall River R. R., 3 Id. 18 [80 Am. Dec. 49]; *Wilson v. Charlestown*, 8 Id. 137.

We should have no doubt, if the evidence in the case at bar had disclosed nothing more than that the plaintiff crossed a railroad track, with due notice of its existence, and without looking to see whether a train were approaching, that the principle of those cases would be applicable to this. Such evidence, with nothing to explain or qualify it, would not have shown the exercise of due care, but the contrary.

But we are of opinion that the other facts which appeared in evidence had a very important bearing upon the propriety of the plaintiff's conduct, and that all the circumstances taken together presented a case which was proper to be submitted to the jury, and which the court could not rightfully withdraw from their consideration.

It was shown that the plaintiff had purchased his ticket entitling him to a passage to Boston, and was waiting in the passenger station for the arrival of the train; that when the whistle of the approaching train was heard, the station agent employed by the defendants said to him: "The train is coming; we will cross over." Upon receiving this information and direction, the plaintiff followed the station agent from the room across toward the train, which had arrived and stopped before he came out on the platform. The path by which he went to the train was somewhat oblique, so that the engine which struck him came in a direction partially behind him. Whether, in this condition of things, in his anxiety seasonably to reach the train, which would stop but a moment, the plaintiff, at a station with which he was not familiar, would have been likely to be thrown off his guard by the direction to cross over, given without any caution or qualification; whether he might naturally, and without subjecting himself to the imputation of want of care, have considered himself under the charge of the defendants' agent, with an assurance that it was safe and proper to go directly to the cars, were questions for the jury, and not for the court. They were submitted to the jury, with instructions which were appropriate and sufficient, and to which, in the opinion of this court, the defendants had no just ground of exception.

The next exception taken was to the instruction given to the jury, "that a person who had purchased a ticket entitling him to a passage on a particular train was to be considered, while passing from the office or place of business where the

purchase was made to the train, to take his seat in one of the cars of which it consists, as a passenger; and that the defendants were bound to exercise the same degree of care in providing for him a safe and convenient way and manner of access to the train, and in preventing the interposition of any obstacle or obstruction which would unreasonably impede him or expose him to harm or injury while proceeding to take his seat in the cars, as in the subsequent transportation and carriage of him." We think this instruction, though not strictly correct as a general proposition applicable to all cases of the kind, was not erroneous, if taken with the qualifications which the particular case afforded, and which must have been obviously understood as included in it. As a general statement it was too broad, because a passenger may buy his ticket at an office which is not in the same town, or even in the same state, in which he intends to take the cars. The railroad company have no control over his movements, and he does not, by the purchase of a ticket, put himself under their charge. But if he is "passing from the office or place of business where the purchase was made to the train, to take his seat in the cars," on the premises belonging to the company, connected with the railroad, and under the direction of the company's agents, given to him as a passenger with whom the company have made the contract for conveyance which the purchase of the ticket creates, as was the case with the plaintiff, we think he is to be considered as a passenger, and entitled to the rights of a passenger while so passing. It is the duty of the railroad company to afford to the passengers whom they undertake to carry in their cars a reasonable and safe opportunity to pass from the room or building in which they receive passengers for transportation, to the cars, when the proper time comes for them to take their seats. The purchasers of tickets are bound to comply with all reasonable rules and orders of the company or their agents, as much when going to the cars from the station-house, or from the cars to a place of safety beyond the railroad track, as they are when actually on board the train, and while the transit continues. The instruction to the jury, therefore, seems to have been sufficiently adapted to the circumstances of the case, and this exception cannot be sustained.

The remaining exception was taken to the terms in which the judge who presided at the trial defined the degree of care which the law imposes upon carriers of passengers for hire. The language used was precisely that in which the rule of law

was laid down by this court in the case of *Ingalls v. Bills*, 9 Met. 1 [43 Am. Dec. 346]. Upon a full examination and review of the English and American cases, Mr. Justice Hubbard, in that case, declared the result to be "that carriers of passengers for hire are bound to use the utmost care and diligence in the providing of safe, sufficient, and suitable coaches, harnesses, horses, and coachmen, in order to prevent those injuries which human care and foresight can guard against"; and the change of phraseology in the case at bar was only that required to adapt this rule to the circumstances of the carriage of passengers by railroad.

The rule in its full extent has been recognized and affirmed in several subsequent decisions: *McElroy v. Nashua and Lowell R. R.*, 4 Cush. 400 [50 Am. Dec. 794]; *Schopman v. Boston and Worcester R. R.*, 9 Id. 24 [55 Am. Dec. 41]. The carriers of passenger are not, like the carriers of goods, insurers against everything but the act of God and public enemies. But they are bound to exercise reasonable care according to the nature of their contract; and as their contract involves the safety of the lives and limbs of their passengers, the law requires the highest degree of care which is consistent with the nature of their undertaking.

The defendants object that they cannot be held to the exercise of the utmost care and diligence which human care and foresight are capable of. But such was not the language of the court. They were only held to the utmost care in providing suitable and proper carriages, engines, tracks, and agents, in order to prevent those injuries which human care and foresight can guard against. The object is to prevent such injuries as are the subject of human care and foresight; that is, such as are not inevitable. The duty is to use the utmost care in regard to the ordinary and usual appliances and means of carrying on their business. They are not to take every possible precaution to prevent injury; for that would be inconsistent with the cheapness and speed which are among the chief objects of railway traveling. But their care is to be exercised in relation to such matters and in such ways as are appropriate to the business they have undertaken, to afford proper and reasonable securities against danger; and it is only in regard to these, from the importance of the interests involved, that they are held to a proportionate, that is, to the utmost care, and diligence.

Exceptions overruled.

PLAINTIFF CANNOT RECOVER FOR NEGLIGENCE WHERE HE WAS HIMSELF NEGLIGENCE: *Murch v. Concord R. R. Corp.*, 61 Am. Dec. 631; *Kerohacker v. Cleveland etc. R. R. Co.*, 62 Id. 246; *Adams v. Wiggins F. Co.*, 72 Id. 247; *Reeves v. Delaware etc. R. R. Co.*, 72 Id. 713; *Gahagan v. Boston etc. R. R. Co.*, 79 Id. 724; *McCully v. Clarke*, 80 Id. 584; *Baltimore etc. R. R. Co. v. Worthington*, 83 Id. 578, and notes to these cases. Where servant's neglect contributed to injury, he cannot recover therefor in an action against the masters: *Buzzell v. Laconia Mfg. Co.*, 77 Id. 212.

BURDEN OF PROOF IN ACTIONS FOR NEGLIGENCE IS UPON PLAINTIFF: *McCully v. Clarke*, 80 Am. Dec. 584, and note 588; he must show his own use of due care: *Gahagan v. Boston etc. R. R. Co.*, 79 Id. 724; and make out a *prima facie* case as he charges it: *Winston v. Taylor*, 75 Id. 112. Compare *Milwaukee etc. R. R. Co. v. Hunter*, 78 Id. 699.

NEGLECT—NONSUIT OR VERDICT FOR DEFENDANT MAY BE DIRECTED, WHEN: *Milwaukee etc. R. R. Co. v. Hunter*, 78 Am. Dec. 699; *Gahagan v. Boston etc. R. R. Co.*, 79 Id. 724.

CONTRIBUTORY NEGLIGENCE SUFFICIENT TO WITHDRAW CASE FROM JURY: *Todd v. Old Colony etc. R. R. Co.*, 83 Am. Dec. 679, and note thereto.

PERSON WHO HAS SECURED RAILROAD TICKET, and is merely crossing a side-track for the purpose of taking the train, is not a passenger, and cannot recover as such, if he is injured by being struck by the train: *Indiana Cent. Ry Co. v. Hudelson*, 74 Am. Dec. 254.

CARE IMPOSED UPON CARRIERS OF PASSENGERS FOR HIRE: See *Nashville etc. R. R. Co. v. Elliott*, 78 Am. Dec. 506, and cases cited in note thereto 514.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: Carrier is bound to use the utmost care which is consistent with the nature and extent of the business in which he is engaged, in the providing of safe, sufficient, and suitable vehicles or vessels and other necessary or appropriate instruments and means of transportation, as well as in the management of the same, and in making such reasonable arrangements as a prudent man would make to guard against all dangers, from whatever source arising, which may naturally and according to the usual course of things be expected to occur: *Simmons v. New Bedford etc. Steamboat Co.*, 97 Mass. 368. But a carrier of passengers does not warrant the absolute safety of his passengers. His undertaking goes no further than this, that he will use reasonable care according to the nature of his contract; and as that involves the safety of the lives and limbs of passengers, the law requires the highest degree of care which is consistent with the nature of the undertaking. If an accident then happens, the carrier is not responsible: *Feital v. Middlesex R. R. Co.*, 109 Id. 405. On the other hand, however, plaintiff must have used reasonable care. Before attempting to cross a railroad track, a man should make a reasonable use of his sense of sight, as well as of hearing, in order to ascertain whether he will expose himself to a collision. If he fails to use his senses without reasonable excuse, he fails to use reasonable care: *Butterfield v. Western R. R. Corp.*, 10 Allen, 532; *Wheelock v. Boston etc. R. R. Co.*, 105 Mass. 207. But where he assures himself shortly before, by looking each way, that there is no car approaching which would make the crossing hazardous, his attention, with due regard to his own safety, may be properly turned for an instant, to see if there is any obstruction before him on the track, or excavation in his way, or danger of collision with other passengers passing to or from the cars: *Chaffee v. Boston etc. R. R. Corp.*, 104 Id. 116. If he attempts to cross a railroad track at a station, for the purpose of taking the car, with-

out looking to see if a train is approaching, but goes upon the invitation and under the direction of the station agent, it is a question for the jury whether in so crossing he uses due care: *Wheelock v. Boston etc. R. R. Co.*, 105 Id. 207. The plaintiff is required to prove not only that the defendants were negligent, but also that his own negligence did not in any degree contribute to his own injury. The burden is upon him to show affirmatively that he was in the exercise of due care: *Allyn v. Boston etc. R. R. Co.*, 105 Id. 78; *Detroit etc. R. R. Co. v. Van Steinburg*, 17 Mich. 120. But it is not the duty of the court to decide the question on the preponderance of the evidence. That is for the jury: *Bayley v. Eastern R. R.*, 125 Mass. 65. And the refusal of the judge to withdraw the case from the jury cannot in any case be construed as an indication that, in his opinion, the jury ought to find in the plaintiff's favor upon this question. On the contrary, it is his duty to submit it to the jury, if there is any evidence to justify a finding, although in his opinion its preponderance should be against the plaintiff: *Gaynor v. Old Colony etc. R'y Co.*, 100 Id. 212. One who has bought a ticket, or otherwise become entitled to transportation on a particular train of cars of a railroad corporation, is ordinarily a passenger of the corporation from the time when he reasonably and properly starts from the ticket-office or waiting-room in the station to take his seat in a car of the train, till he has reached the station to which he is entitled to be carried, and has had an opportunity, by safe and convenient means, to leave the train and roadway of the corporation at that station: *Commonwealth v. Boston etc. R. R.*, 129 Id. 501. A passenger may sue a carrier, to recover damages for an injury sustained through his negligence, either in tort or contract, as the rule of duty is the same in either form of action: *Eaton v. Boston etc. R. R. Co.*, 11 Allen, 505. The principal case was distinguished in *Forsyth v. Boston etc. R. R. Co.*, 103 Mass. 514; *Mayo v. Boston etc. R. R.*, 104 Id. 141. For instructions conforming, in all essential particulars, to those in the principal case, see *Cassell v. Boston etc. R. R. Corp.*, 98 Id. 204.

WOOSTER v. TARR.

[8 ALLEN, 270.]

BILL OF LADING IS SIMPLE WRITTEN CONTRACT BETWEEN SHIPPER OF GOODS AND SHIP-OWNER; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed.

MASTER IS NOT BOUND AT HIS PERIL TO ENFORCE PAYMENT OF FREIGHT FROM CONSIGNEES. He may waive his right of lien, deliver the goods without receiving payment of the freight, and yet his right to resort to the shipper for compensation still remains.

SHIPPER NAMED IN BILL OF LADING IS LIABLE TO CARRIER FOR FREIGHT, although he does not own the goods, and the carrier has waived his lien upon them, as he is the party with whom the owner or master enters into the contract of affreightment.

CONTRACT to recover for the carriage of mackerel from Halifax to Boston. Defendants had shipped the mackerel at Halifax upon a vessel of which the plaintiffs were part owners. Wooster was master. The bill of lading was in the usual form, to be delivered at Boston, "unto Messrs. R. A.

Howes & Co., or to their assigns, he or they paying freight for said goods," etc. Wooster was informed by Howes & Co., upon the arrival of the vessel at Boston, that the mackerel "to arrive" had been sold to a person to whom they requested him to deliver them. The mackerel were accordingly delivered, and payment demanded of Howes & Co., but refused. Howes & Co. were insolvent. The mackerel, when delivered on board the vessel, had been purchased and paid for by the defendants for and on account of Howes & Co., at whose risk they were after shipment. This fact was unknown to plaintiffs. The mackerel were entered at the custom-house in Halifax in the name of defendants. Judgment for plaintiffs, and defendants appealed.

T. H. Russell, for the defendants.

H. C. Hutchins, for the plaintiffs.

By Court, BIGELOW, C. J. The question raised in this case is very fully discussed in *Blanchard v. Page*, 8 Gray, 281, 286, 290-295. It is there stated to be the settled doctrine that a bill of lading is a written simple contract between a shipper of goods and the ship-owner; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. Of the correctness of this statement there can be no doubt. The shipper or consignor, whether the owner of the goods shipped or not, is the party with whom the owner or master enters into the contract of affreightment. It is he that makes the bailment of the goods to be carried, and, as the bailor, he is liable for the compensation to be paid therefor. The *dictum* of Bayley, J., in *Moorsom v. Kymer*, 2 Maule & S. 318, subsequently repeated by Lord Tenterden in *Drew v. Bird*, Moody & M. 156, that in the absence of an express contract by the shipper to pay freight, when the goods are, by the bill of lading, to be delivered on payment of freight by the consignee, no recourse can be had for the price of the carriage to the shipper, has been distinctly repudiated, and cannot be regarded as a correct statement of the law: *Sanders v. Van Zeller*, 4 Q. B. 260, 284; Maclachlan on Shipping, 426.

It is contended, on the part of the defendants, that the omission of the master to collect the freight of the consignees of the cargo or their assigns, under the circumstances stated, was a breach of good faith towards the shippers, which operates as an estoppel on him and the other owners of the vessel, whose agent he was, to demand the freight money of the de-

defendants. But there are no facts on which to found an allegation of bad faith against the master. He did no act contrary to his contract, or inconsistent with his duty towards the shippers. It is true that he omitted to enforce his lien on the cargo for the freight, by delivering it without insisting on payment thereof by the consignees. This was no violation of any obligation which he had assumed towards the defendants as shippers of the cargo. A master is not bound at his peril to enforce payment of freight from the consignees. The usual clause in bills of lading, that the cargo is to be delivered to the person named, or his assignees, "he or they paying freight," is only inserted as a recognition or assertion of the right of the master to retain the goods carried until his lien is satisfied by payment of the freight, but it imposes no obligation on him to insist on payment before delivery of the cargo. If he sees fit to waive his right of lien and to deliver the goods without payment of the freight, his right to resort to the shipper for compensation still remains: *Shepard v. De Bernales*, 13 East, 565; *Domett v. Beckford*, 5 Barn. & Adol. 521, 525; *Christy v. Row*, 1 Taunt. 300. Although the receipt of the cargo under a bill of lading in the usual form is evidence from which a contract to pay the freight money to the master or owner may be inferred, this is only a cumulative or additional remedy, which does not take away or impair the right to resort to the shipper on the original contract of bailment for the compensation due for the carriage of the goods.

Judgment for the plaintiffs.

BILL OF LADING AS CONTRACT: See extended note to *Chandler v. Sprague*, 38 Am. Dec. 407-426, on bills of lading; *Wayland's Adm'r v. Mosely*, 39 Id. 335; *O'Brien v. Gilchrist*, 56 Id. 676; *Steele v. Townsend*, 79 Id. 49.

CONSIGNOR IS LIABLE FOR FREIGHT: *Barker v. Havens*, 8 Am. Dec. 393; *Hayward v. Middleton*, 15 Id. 615; *Grant v. Wood*, 47 Id. 162; though he be a forwarding merchant: *Railey v. Porter*, 82 Id. 141. And a stipulation in the bill of lading providing that the consignee shall pay it does not of itself relieve the consignor. The carrier may waive his lien and resort to the consignor, unless the latter is exonerated by some special stipulation: *Grant v. Wood*, 47 Id. 162; *Holt v. Wescott*, 69 Id. 74.

ROGERS v. WARD.

[8 ALLEN, 387.]

LIABILITY OF MARRIED WOMAN'S SEPARATE ESTATE FOR HER DEBT. —

Where debt created by married woman's contract is expressly made a charge on her separate estate, or is expressly contracted on its credit, or where the consideration goes to the benefit of such estate, or to enhance its value, equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go.

IN EQUITY, MARRIED WOMAN IS LIABLE ON HER BOND GIVEN FOR PRIOR OF LAND conveyed to her for her sole and separate use, so far as she has the right to dispose of her separate estate, and a bill will lie to enforce payment therefor out of her separate estate, where no effectual remedy exists at law.

BILL IN EQUITY, SUFFICIENT ALLEGATIONS IN, TO ENFORCE PAYMENT OF MARRIED WOMAN'S BOND OUT OF HER SEPARATE ESTATE. — Where a bill in equity has been brought to enforce payment, out of the separate estate of a married woman, of a bond given by her for the price of land conveyed to her sole and separate use, it need not set out any specific estate or property belonging to the defendant in her own right, but may allege generally that she is possessed of property to her sole and separate use, and subject to her disposal, which is chargeable with the payment of the bond.

TAKING OF COLLATERAL SECURITY FOR PAYMENT OF DEBT AFFORDS NO IMPLICATION THAT CREDITOR IS TO LOOK TO IT ONLY or primarily for the payment of the debt. The debtor's obligation to respond in his person and property is the same as if no security had been given.

MORTGAGE GIVEN BY MARRIED WOMAN TO SECURE PAYMENT OF HER BOND given for an estate conveyed to her own use, etc., in no degree affects or impairs the equity of the plaintiff to enforce payment for the property out of her separate estate.

TRUSTEE IS NECESSARY PARTY TO BILL IN EQUITY to enforce payment of married woman's debt out of her separate estate, where it appears that her property is in the hands of a trustee.

EQUITY HAS JURISDICTION, INDEPENDENT OF STATUTE, TO CAUSE MARRIED WOMAN'S SEPARATE ESTATE, so far as the *jus disponendi* is vested in her, to be applied in payment of debts contracted by her.

EQUITY HAS JURISDICTION WHERE NO ADEQUATE AND COMPLETE REMEDY AT LAW EXISTS — SUCH REMEDY DOES NOT EXIST, WHEN. — Where it does not appear that the debt which plaintiff seeks to enforce against the separate estate of a married woman was contracted in this commonwealth, or is of such a nature that a married woman would be liable thereon, and her property be subject to attachment under our statutes, no adequate and complete remedy at law appears, and equity has jurisdiction.

BILL in equity, alleging that the defendant, the wife of J. W. Ward, in November, 1855, purchased an estate of Isaac Henderson, in Jamaica, New York, for a sum not less than eighteen thousand dollars; that she assumed and agreed to pay, as a part of the consideration thereof, a mortgage thereon

for six thousand dollars, which had been given by Henderson; that as a further portion of such consideration, she executed jointly with her husband a bond for six thousand dollars to Henderson, and a mortgage on the estate to secure the same; that said bond and mortgage had since been assigned by Henderson to the plaintiff; that the whole of the principal and a part of the interest thereon were due; that the first mortgage upon the estate had been foreclosed, and the estate sold at sheriff's sale, under the laws of New York, to pay the mortgage, and that it had brought an insufficient amount to pay the same; that the estate had been conveyed to the defendant as her sole and separate property; that she had sold the same for a large sum since the date of said bond and mortgage given to Henderson; that she had other sole and separate property, either in her own name, or in the name or hands of a trustee, which ought to have been and was holden for and chargeable with the payment of the bond and interest thereon; but that she had refused to pay the same. The prayer was for a discovery and a decree for the payment of the bond out of the defendant's separate estate. Defendant filed a general demurrer, and the judge reserved the case for the determination of the whole court.

H. C. Hutchins, for the defendant.

H. W. Paine, for the plaintiff.

By Court, BIGELOW, C. J. The main question which the defendant seeks to raise by the demurrer to this bill has been fully considered and determined in the recent case of *Willard v. Eastham*, 15 Gray, 328 [77 Am. Dec. 366]. It was there held, on a careful and considerate view of the authorities and of the principles involved in them, that where, by a contract entered into by a married woman, the debt created by it is made expressly a charge on her separate estate, or is expressly contracted on its credit, or where the consideration goes to the benefit of such estate, or to enhance its value, equity will decree that it shall be paid from such estate, or its income, to the extent to which the power of disposal by the married woman may go. On the facts set out in the bill, it is clear that the debt which the plaintiff seeks to recover in this suit was contracted on a consideration which went to the benefit of the separate estate of the defendant. The bond described in the bill, and which the plaintiff now holds, was given by the defendant for a portion of the purchase-money of an estate

which was conveyed to her, to her sole and separate use. The case therefore comes within the rule laid down in the case cited. The estate of the defendant, though she was under coverture when the debt was contracted, is liable therefor, not because the contract has any validity at law, nor by way of appointment or charge, but on the ground that it is just and equitable that the debt should be paid out of the estate which received the benefit of the consideration on which was contracted.

Nor can we see that the fact stated in the bill, that a mortgage was given by the defendant to secure the payment of the bond now held by the plaintiff, in any degree affects or impairs the equity of the plaintiff to enforce its payment against the separate estate of the defendant. The taking of collateral security for the payment of a debt does not afford any implication that the creditor is to look to it only or primarily for the payment of the debt. The obligation of the debtor to respond in his person and property is the same as if no security had been given. This is the settled rule at law: *Cornwall v. Gould*, 4 Pick. 448; *Beckwith v. Sibley*, 11 Id. 484; *Taylor v. Cheever*, 6 Gray, 146. It seems to us that equity should follow the law, and apply the same rule to debts contracted by married women. The equitable relief which is afforded to enforce payment of such debts out of their separate property is founded on the reason that the contract is entered into in such form as to indicate an intent to create a personal liability by the wife. Equity will give effect to this intention by assisting the creditor to reach and apply her separate estate, so far as the *jus disponendi* is vested in her. This intent and the facts on which it rests are in no degree affected by the giving of collateral security. The contract, being entered into by the married woman in such manner as would create a personal obligation on her if sole, is decisive evidence that she did not intend that the creditor should look exclusively to the property which was pledged for its payment, but that he should have such other remedies for the enforcement of his claim as her personal promise to pay the debt might give him.

Another ground urged by the counsel for the defendant in support of the demurrer is, that the bill does not set out any specific estate or property belonging to the defendant in her own right. But such a statement is not necessary. It is sufficient that it is distinctly alleged that she is possessed of property to her sole and separate use and subject to her disposal,

which is holden for and chargeable with the payment of the debt due to the plaintiff. If, on the coming in of the answer, the defendant does not disclose the existence of such property, but denies the allegation, it will be incumbent on the plaintiff to support it by proof, or, failing to do so, to forfeit his claim to equitable relief. In like manner, if it shall be made to appear that the separate property of the wife is held by a trustee, it will be necessary for the plaintiff, in order to entitle himself to a decree, to amend his bill by making such trustee a party. But until it appears that the property of the defendant is in the hands of a trustee, so that it cannot be properly reached and applied to the payment of the plaintiff's debt without making the trustee a party, the bill is not defective or open to demurrer.

It is also suggested that when the bond was given by the defendant it could not have been enforced in this commonwealth against her separate estate, because no court had then the power to take cognizance in equity over the subject-matter of the bill, and that this court cannot now afford the relief which the plaintiff seeks by enforcing a contract entered into prior to the time when full chancery jurisdiction was conferred upon it. But this argument confounds the distinction between a right and a remedy. The contract and the obligation imposed by it on the defendant, to apply her separate property in payment of the debt, did not acquire any force or validity from the statute which gave full equity power to this court. These existed prior to and independently of the statute, which only supplied the means by which they could be enforced.

Finally, it is urged that the bond set out in the bill, being a debt contracted by the defendant in relation to her separate property, is, under the statutes of this commonwealth, a debt which can be enforced at law against the separate property of the wife, and that the plaintiff, having thus an adequate and complete remedy at law, cannot ask for the interference of this court to grant him equitable relief. But the answer to this objection is, that it does not appear that the debt which the plaintiff seeks to enforce in this suit was contracted in this commonwealth, or is of such a nature that a married woman would be liable thereon, and her property be subject to attachment under our statutes.

Demurrer overruled.

Am. Dec. 366; *Yale v. Dederer*, 78 Id. 216; *Macloy v. Love*, *ante*, p. 133, and collected cases in the notes thereto, particularly the extended note to *Yale v. Dederer*, 78 Id. 226-228.

WIFE'S BOND OR NOTE BINDS HER SEPARATE ESTATE IN KENTUCKY: *Burch v. Breckinridge*, 63 Am. Dec. 553.

COLLATERAL SECURITY MUST NOT BE ALLOWED TO FAIL, WHEN: *Roberts v. Thompson*, 82 Am. Dec. 465.

MORTGAGE IS MERE COLLATERAL SECURITY FOR PAYMENT OF DEBT: *Burke v. Cruger*, 58 Am. Dec. 102; *Brown v. Blydenburgh*, 57 Id. 506; and the mortgagee may collect his debt without regard to the mortgage security: *Ryan v. Dunlap*, 63 Id. 334; *Burke v. Cruger*, 58 Id. 102.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: A bill in equity, to reach the separate property of a married woman, for the payment of obligations contracted by her, and which go to the benefit of her separate estate, is maintainable, if there is no adequate remedy at law: *Robinson v. Trofitter*, 109 Mass. 479; *Phoenix Ins. Co. v. Abbott*, 127 Id. 561; and equity will decree that her debt created thereby shall be paid from such estate to the extent to which her power of disposal may go: See case last cited. Where existing rights can only be enforced in a court of chancery, and no equity jurisdiction exists, they cannot be enforced. But this affects the remedy only, and not the right, and does not prevent a court of equity, when one is erected by the legislature with ample powers, from maintaining such right and protecting it: *Clapp v. Ingraham*, 126 Id. 203. A married woman's note raises an implication, in the absence of a different understanding, that her separate estate is to be charged with its payment: *Avery v. Vansickle*, 35 Ohio St. 276; *Heburn v. Warner*, 112 Mass. 277; and this implication is not at all affected by the execution of a mortgage as collateral security to the note: *Avery v. Vansickle*, 35 Ohio St. 276. The obligation of the debtor to respond on his note in his person and property is the same as if no security had been given; the rights of the creditor upon the note cannot be curtailed by the fact that there is no security, nor can the obligations of the debtor be varied or enlarged thereby: *Heburn v. Warner*, 112 Id. 274. A married woman's mortgage upon her separate estate will make her liable: *Heburn v. Warner*, 112 Mass. 277.

POMEROY v. TRIMPER.

[8 ALLEN, 386.]

VALUE OF GOODS REPLEVIED NEED NOT BE ALLEGED in writ or declaration under the English law.

VALUE OF GOODS TO BE REPLEVIED NEED NOT BE ALLEGED IN WRIT OF REPLEVIN, directed to a deputy sheriff. Such is the construction of the statutes of Massachusetts, and the law is understood to be the same in Maine.

PLAINTIFF'S ALLEGATION OF VALUE IN WRIT OF REPLEVIN TO BE SERVED BY SHERIFF OR HIS DEPUTY has, when made, been held admissible against him in evidence of the value, but not to be conclusive evidence of the value of the property, even on the question of the jurisdiction of the court; and it is not in any way binding on the defendant.

VALUE OF GOODS TO BE REPLEVIED OUGHT, PERHAPS, TO BE ALLEGED IN WRIT OF REPLEVIN where it is served by a constable, because his authority to serve it is limited to cases in which the sheriff or his deputy is a party, and the property does not exceed a certain value; and because his authority in specific cases must appear on the face of the writ.

WHERE DEFENDANT IN REPLEVIN PUTS IT OUT OF OFFICER'S POWER TO EXECUTE WRIT and deliver the property to the plaintiff, the plaintiff may proceed in the cause, and recover damages for the full value of the property, as well as for the detention.

DEFENDANT IN REPLEVIN WHO PREVENTS OFFICER FROM DELIVERING PROPERTY REPLEVIED TO PLAINTIFF BY ATTACHING IT upon a writ in his own favor, cannot object to the prosecution of the replevin on the ground of such non-delivery.

DESCRIBING ANIMAL IN WRIT OF REPLEVIN AS "HEIFER" and in certificate of appraisement as "cow," is no ground for dismissing the writ, particularly where the description in the appraisement directly refers to the writ, and clearly identifies the animals replevied.

ACTION BETWEEN DIFFERENT PARTIES AND FOR DIFFERENT CAUSE IS NO BAR TO ACTION OF REPLEVIN. — Where the plaintiff, in a writ of replevin, has caused the officer, to whom the writ was committed, to bring an action against the defendant and another officer for taking the replevied property out of his hands by writ of attachment, before its delivery to the plaintiff, such suit is between different parties and for a different cause, is no bar to the replevin suit, and is no ground for dismissing it.

SUIT FOR DIFFERENT CAUSE OF ACTION IS NO BAR TO REPLEVIN SUIT. — Where the plaintiff in a replevin suit has begun an action as executor against the defendant and his officer for the conversion of the replevied property, and it fails to appear that the conversion relied upon is the same act for which the replevin is brought, it cannot affect the replevin suit.

REPLEVIN of "one brown heifer, one gray heifer," and other chattels. The writ was dated April 7, 1860, and returnable at the June term, 1860. The appraisement was of "the within-named brown cow" and "the gray cow," and of the other chattels as described in the writ; and showed their value to be more than twenty dollars. After setting forth the appraisement of the property and the taking of a bond from the plaintiff to the defendant, the officer, in his return, stated that he thereupon replevied the property; that while he was transporting it for the purpose of delivery to the plaintiff, it was forcibly taken from him, without his consent, by Harvey Holmes, a deputy sheriff, by attachment on mesne process in favor of the defendant against the plaintiff; that therefore he could not deliver it to the plaintiff; and that he had summoned the defendant by delivering to him a copy of the writ of replevin. Defendant, on a motion to dismiss, and in his answer, set up in defense: 1. That the writ alleged no values of the chattels replevied, and so did not show that they were of sufficient

value to give the court jurisdiction; 2. That it appeared by the officer's return that there had been no complete replevy and delivery of the property described in the writ, and no sufficient service thereof; 3. That the appraisement was of other property than that described in the writ; 4. That the plaintiff had caused the officer who served the writ of replevin to bring an action of tort against this defendant and Holmes for the wrongful taking and conversion of the property replevied, which action was brought after the writ of replevin, returnable to June term of the superior court in Hampden, and there entered and pending at and before the time of the entry of this action, and prosecuted for the benefit of this plaintiff; 5. That on May 1, 1860, the plaintiff became the executor of the will of Elizabeth Van Allen, who died before this replevin was sued out, and thereupon, in his capacity of executor, brought several actions against said Holmes and the defendant for the conversion of the chattels named in the replevin, which were returned to and entered at June term, 1860, of the superior court in Hampshire, and were still pending. In February, 1861, this action of replevin was referred by rule of court in common form. It was found by the arbitrators that the actions were brought and pending in Hampden and Hampshire, as alleged by the defendant, and that E. Van Allen died in 1857. They awarded in favor of the plaintiff, subject to the opinion of the court. The superior court accepted the award, and the defendant appealed.

M. Wilcox, for the plaintiff.

I. Sumner, for the defendant.

By Court, GRAY, J. 1. It is unnecessary in this case to inquire whether the general rule of the English law, that the value of goods replevied need not be alleged in the writ or declaration, would, under that law, extend to writs of replevin in the form used in this commonwealth: See *Wilkinson on Replevin*, 41; *Gibbs v. Bartlett*, 2 Watts & S. 35; *Root v. Woodruff*, 6 Hill, 424, and authorities there cited; 5 Dane Abr. 521. For we are of opinion that in this commonwealth the rule is fixed by statute.

The statutes of the Massachusetts Colony declared that "every man shall have liberty to replevy his cattle or goods impounded, distrained, seized, or extended" (without limit of value), "unless it be upon execution after judgment, and in payment of fines": Body of Liberties of 1641, art. 82; Mass.

Col. Laws, ed. 1660, 69; ed. 1672, 132; Anc. Chart. 184. The law of the Plymouth Colony was similar: Plym. Col. Laws, ed. 1672, 14; ed. 1685, 6; ed. 1836, 256. The form of writ published with the Massachusetts Colony laws, as well as those prescribed in the statutes of the province, did not contain any allegation of value of cattle distrained or impounded, nor indicate that any such allegation was required in any writ of replevin: Mass. Col. Laws, ed. 1672, 162, 163; Prov. Stats., 18 Wm. III., 1701, c. 13; 7 Geo. I., 1720, c. 7; ed. 1726, 158, 289, 290. It may be that in the province, as in the mother country, the writ of replevin, although allowed by law for any goods unlawfully taken, was not in use except for distresses or for impounded cattle: See Prov. Stats., 9 Wm. III., 1697, c. 2, sec. 2; 10 Wm. III., 1698, c. 4; ed. 1726, 86, 96; Wilkin-son on Replevin, 2, 143; *Mellor v. Leather*, 1 El. & B. 628, 629, and authorities cited; *Mennie v. Blake*, 6 Id. 847.

But the first statute of replevins of the commonwealth, after directing the mode of proceeding before a justice of the peace upon replevin of "cattle restrained or impounded," expressly authorized the suing out of a replevin from the court of common pleas, for "any goods or chattels taken, distrained or attached," "of the value of more than four pounds." And the same statute, which thus limited the writ to chattels above a certain value, established a form of writ, in which the chattels were directed to be "enumerated and particularly described," but were not required to be valued: Stats. 1789, c. 26, sec. 4; 5 Dane Abr. 515, 532. The later statutes substitute "twenty dollars" for "four pounds," and provide that the writ shall be substantially in the form heretofore established and used: R. S., c. 113, secs. 27, 28; Gen. Stats., c. 143, secs. 10, 11. These statutes are decisive that no allegation of value need be made by the plaintiff. And so the law is understood to be in Maine, under like statutes: *Thomas v. Spofford*, 46 Me. 410.

The statute of 1789, c. 26, sec. 4, required the officer serving the writ to take a bond from the plaintiff to the defendant in twice the value of the goods, for the prosecution of the replevin to final judgment, and the payment of any damages and costs recovered by the defendant; but did not prescribe any mode of fixing this value; and of course left the officer liable to an action, if he took insufficient security: *Ladd v. North*, 2 Mass. 516, 517; *Murdoch v. Will*, 1 Dall. 841; *Gibbs v. Bull*, 18 Johns. 435; *Kimball v. True*, 84 Me. 84; *Jeffery v. Bastard*, 4 Ad. & E.

823. Under that statute a practice grew up, to some extent, of inserting a valuation in the writ, perhaps with a view of guiding the officer in fixing the amount of the security which he should require of the plaintiff. But the plaintiff, who expected in most cases to recover the goods specifically, and damages for their detention only, had no interest in setting the goods at their full value, and often undervalued them in the writ in order to diminish the penalty of his bond. To avoid this, and perhaps also to protect the officer, the statute of 1824, c. 106, sec. 1, provided that, whenever the defendant or the officer should suppose that a bond in a sum twice the value of the goods as alleged in the writ might be an insufficient security, the officer should cause them to be appraised by three disinterested persons, and return their appraisement on the writ, and take a bond to the defendant in double such appraised value. That statute only shows that a valuation had been sometimes inserted in the replevin writ, not that it was useful or necessary. And the re-enactments of the provision do not mention any valuation in the writ: R. S., c. 113, secs. 20, 29; Gen. Stats., c. 143, secs. 4, 12.

There are several cases in which such an allegation has been made by the plaintiff, and, when made, has been held admissible against him in evidence of the value: *Clap v. Guild*, 8 Mass. 153; *Huggeford v. Ford*, 11 Pick. 224; *Barnes v. Bartlett*, 15 Id. 79; *Swift v. Barnes*, 16 Id. 196, 197. But it has been repeatedly held not to be conclusive evidence of the value of the property, even on the question of the jurisdiction of the court, nor to be in any way binding on the defendant: *King v. Dewey*, 11 Cush. 218; *Swift v. Barnes*, 16 Pick. 197; *Small v. Swain*, 1 Greenl. 135; *Thomas v. Spofford*, 46 Me. 410.

An exception to the rule established by the statutes above cited, that the writ need not allege the value, may perhaps exist where the writ is to be served by a constable, whose authority to do so is limited to cases in which the sheriff or his deputy is a party, and the property does not exceed a certain value: Gen. Stats., c. 18, sec. 61. In such a case, Chief Justice Shaw said: "The authority to the constable is given only in specific cases, which must appear on the face of the writ." But the writ was dismissed, not for want of alleging the value, but for not showing that the sheriff or his deputy was a party: *Conner v. Palmer*, 13 Met. 303.

In the case now before us, if any allegation of value had

been necessary, it might have been inserted by amendment, and its omission would have been waived by the general rule of reference: *Jaques v. Sanderson*, 8 Cush. 273; *Merrill v. Gold*, 1 Id. 460; *Day v. Berkshire Woolen Co.*, 1 Gray, 423.

2. There was no defect of service, of which the defendant can take advantage. The officer had caused the value of the property to be ascertained, and security to be given to the defendant in the manner required by law, and had taken the property into his custody, when it was forcibly taken from him at the defendant's suit. It is well settled in England and in Pennsylvania, and, it would seem, in New York, that when the defendant wrongfully puts it out of the power of the officer to execute the writ and deliver the property to the plaintiff, the plaintiff may proceed in the cause, and recover damages for the full value of the property, as well as for the detention: *Wilkinson on Replevin*, 20, 43, 85; *Bower v. Tallman*, 5 Watts & S. 561; *Baldwin v. Cash*, 7 Id. 426; *Snow v. Roy*, 22 Wend. 604. And we can have no doubt that such is the law of Massachusetts. This would have afforded a strong reason for requiring the value to be stated in the writ, if the statutes already cited had not clearly dispensed with any such allegation. As by our practice no declaration, other than is contained in the writ, need be or usually is filed, it would be strange if a writ sued out in the form prescribed by the statute could be rendered insufficient by the defendant's subsequent wrongful interruption of the service.

If the objection to the service could ever have availed the defendant, it was clearly waived by the reference of the action.

3. The court know no authority for considering a "heifer" to be misdescribed as a "cow," except in the single instance of interpreting a penal statute, which, by using both words, manifested an intention to distinguish the one from the other: *Rez v. Cook*, 2 East P. C. 616; S. C., 1 Leach, 4th ed., 105; *Freeman v. Carpenter*, 10 Vt. 434 [33 Am. Dec. 210]; *Carruth v. Grassie*, 11 Gray, 211. In a case in the Year-books, a man brought replevin of a heifer (*juvenca*), and was afterwards nonsuit, and sued out his writ of second deliverance of a cow (*vacca*); to which the defendant's counsel objected on the ground of variance; but Fitzherbert, J., said: "The writ is good; for it may be that it was a heifer at the time of suing out the replevin, and that it is now a cow": Year-book, 28 Hen. VIII., p. 6, pl. 27. So here, if there were a well-defined

line between a heifer and a cow, the court could not upon this record infer that the animals in question had not passed it after the suing out of the replevin and before the appraisement. But our decision need not rest upon this, for the description in the appraisement directly refers to the writ, and clearly identifies the animals replevied.

4. The action brought by the officer who served the replevin against the defendant, and the officer employed by him to interrupt the service and take away the property, is between different parties and for a different cause, and therefore no bar to this action.

5. Upon the same principle, the action brought by the plaintiff as executor of Elizabeth Van Allen, not being shown to be for the same cause of action, cannot affect this case.

Judgment for the plaintiff affirmed.

VALUE OF PROPERTY IN ACTION OF REPLEVIN MUST BE ASCERTAINED, under the statute of Texas, in order to render judgment, and the sheriff is required to assess its value when taking the bond required of the claimant, but the estimate of value thus made is not conclusive upon the parties: *Lean v. Wright*, 70 Am. Dec. 282.

DESCRIPTION IN REPLEVIN, SUFFICIENCY OF: See note to *Stevens v. Osmun*, 48 Am. Dec. 698, 699.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: It is not necessary in a replevin writ to allege the value of the goods to be replevied: *Blake v. Darling*, 116 Mass. 300; *Litchman v. Potter*, 116 Id. 373. The jurisdiction depends upon the actual value as proved at the trial, not upon the plaintiff's allegation or the appraisers' certificate: *Blake v. Darling*, 116 Id. 300. An appraisement was first required by the statute of 1824, c. 106, not for the purpose of determining jurisdiction, but for the benefit of the defendant, and perhaps of the officer: *Davenport v. Burke*, 9 Allen, 117. A heifer is a young cow: *Johnson v. Babcock*, 8 Id. 582.

SNOW v. HOUSATONIC RAILROAD COMPANY.

[8 ALLEN, 441.]

RAILROAD COMPANY IS LIABLE FOR INJURY TO ONE OF ITS SERVANTS, caused by a want of repair in the road-bed of the railroad.

WORKMAN OR SERVANT IS SUPPOSED TO KNOW, AND TO ASSUME, RISKS naturally incident to the employment upon which he enters, among which is the negligence of other servants employed in similar services by the same master, although they may be reasonably fit for the service in which they are engaged.

EMPLOYER OR MASTER IS NOT LIABLE FOR INJURIES CAUSED FROM WANT OF CARE AND CAUTION by servant toward his fellow-servants, which due care on the part of the employer or master could in no way prevent.

EMPLOYER OR MASTER IS LIABLE FOR INJURIES TO SERVANTS OR WORKMEN which happen by reason of improper and defective machinery and appliances used in the prosecution of a work. It is on this principle that the proprietors of a railroad are responsible for accidents happening by tracks improperly laid, etc.

MASTER OR EMPLOYER IS BOUND TO USE DUE CARE IN SUPPLYING AND MAINTAINING SUITABLE INSTRUMENTALITIES for the performance of the work or duty which he requires of his agents or servants, and will be liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care or that of his agents to whom he intrusts the duty. But this liability does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient.

VERDICT MAY BE DIRECTED FOR DEFENDANT WHEN. — Where admitted or uncontroverted facts of case show that the acts and conduct of a plaintiff at the time of an alleged injury, and contributing to produce it, are such as to indicate, according to the common experience and observation of mankind, a want of due and reasonable care, adapted to the circumstances in which he is placed, he does not show any legal cause of action, and it is the duty of the court, in such a state of the proof, to direct a verdict for the defendant.

FACTS PROPER FOR SUBMISSION TO JURY AND NOT TO BE RULED CARELESS AS MATTER OF LAW. — Where the duty of a servant of a railroad company requires him to uncouple the cars of a train, which is ordinarily done while the train is in motion, thereby loosening the bolt sufficiently to enable it to be withdrawn from its socket, and which cannot be done while the train is standing still, and he, in endeavoring to uncouple them while the train is in motion, steps between the cars, but meets with an injury caused by a want of repair of the road-bed of the railroad, the court cannot rule, as matter of law, that he was careless, and should submit the question to be determined by the jury; although he continued in the employment of the company after he knew of the defect.

TORT to recover damages for an injury sustained by the plaintiff in consequence of a want of repair of the road-bed of the defendants' railroad. It appeared that the injury was received at a place in West Stockbridge, where the railroad of the defendants crossed a highway, and near an intersection with the Hudson and Boston Railroad. The Western Railroad Company, as contended by the plaintiff, had a right, under certain contracts, to use the defendants' tracks and switches at this place, for the passing of their cars and engines, and for making up freight trains, and distributing freight-cars from the trains upon the different tracks uniting there. The plaintiff was employed by the Western Railroad Company to attend to the switches upon the defendants' railroad at this place, and to make up and distribute the freight trains for the Western railroad. The position and distances

of various points referred to were exhibited by a plan put in evidence. At the place where the defendants' railroad crossed the highway, three lengths of plank had been laid down between the rails, and up to within about two inches of them, entirely across the highway. One of these planks had become defective, and had a hole in it large enough to admit a man's foot. This hole had existed for more than two months, and the plaintiff had known of it for that length of time, and had complained of it to the one whose duty it was to repair the tracks of the defendants' railroad. It appeared from the plaintiff's testimony that he was forty-seven years of age; that he had been employed upon railroads in various capacities for twenty-three years; that when injured he was distributing a freight train; that for the purpose of giving an impetus sufficient to send the cars to where he wished them to be, he gave a signal to the engineer to back his engine, which was done, thereby giving the cars a slow motion; that while they were so in motion he stepped between the engine and the car next to it, near where the hole in the plank was, for the purpose of uncoupling the cars by taking out a coupling-pin by which they were connected with the engine; that while in that position, endeavoring to get out the pin, the train continued in motion, and he had to take two or three steps with it; that as he pulled out the pin and stepped away, his foot caught in the hole in the plank; that he could not get it out before the wheel of the tender ran over his leg; and that the injury to his leg rendered amputation necessary. It appeared from his testimony that the hole was partly filled by a knot, upon which he stepped; that the knot went down when he stepped upon it, and as he pulled up his foot the knot caught it, and he could not get it out; that after making the signal for the engineer to back his engine, he made no signal for him to stop; that he thought he would have time to get out the pin and get away before he got to the crossing; that he failed to get away before he got to the plank because he had not time; that he did not recollect whether the pin stuck or not; and that he did not think anything about the hole at that time. It further appeared from his testimony that the mode of uncoupling cars adopted by him was a prudent one; that there was no other mode of doing it; that at this point it was an ascending grade; the engine had to ease back, and that he could not have pulled out the pin had the cars been still, unless the engine eased back; and that it would have taken some little

time to stop the cars by the brake, ease up by backing the engine, and then take out the pin. Upon this evidence it was ruled by the judge that the plaintiff could not recover, and a verdict was returned for defendants. Plaintiff alleged exceptions.

H. W. Bishop, for the plaintiff.

J. D. Colt and T. P. Pingree, Jr., for the defendants.

By Court, BIGELOW, C. J. There can be no doubt of the liability of the defendants to respond in damages to a party injured by reason of a defect in the highway caused by their misfeasance or non-feasance. Every one who creates an obstruction to travel, by erecting barriers, making excavations or otherwise, in a public way, is guilty of causing a nuisance, and if special damages are thereby occasioned, an action will lie against him. The remedy which the statute gives for such injuries against towns is only cumulative or additional to that which the party injured has at common law against the person by whose agency the obstruction or defect was caused or permitted to continue: 2 Ch. Pl., 6th Am. ed., 599; *Lowell v. Boston and Lowell R. R.*, 23 Pick. 24, 33 [34 Am. Dec. 33].

We think it equally clear that the defendants are not relieved of this liability to the plaintiff by reason of any relation which subsisted between him and them at the time of the accident, arising out of the employment in which he was engaged. In the first place, on the facts reported in the exceptions, it does not appear that he was employed in any duty or service for or in behalf of the defendants. On the contrary, it is stated that he was in the employment of another corporation. The only connection shown to exist between the parties to this suit is, that the corporation by which the plaintiff was employed had a right to use a portion of the tracks of the railroad belonging to the defendants for certain specific purposes, by virtue of a contract, the precise terms of which are not declared, and that the plaintiff, when the accident happened, was actually engaged in using one of these tracks in making up freight trains, which was one of the objects for which the defendants allowed their road to be used under the contract referred to. On these facts, it is difficult to see how the doctrine applicable to a claim for damages occasioned by the carelessness of a fellow-servant, against a common employer, can have any bearing on the rights of the parties to this action. The case is not unlike that put by way of illus-

ration in *Farwell v. Boston and Worcester R. R.*, 4 Met. 49, 61 [38 Am. Dec. 339], of a railroad owned by one set of proprietors, whose duty it was to keep it in repair, and used by another set of proprietors, with engines and cars, paying toll to the owners of the road. In such case, the intimation of the court is very strong that a servant in the employment of the last-named proprietors would have an action against the former for an injury caused by the negligence of one of their servants.

But, in the next place, a decisive answer to this ground of defense is, that it does not appear that the defect in the road, which was the proximate cause of the accident, was the result of any such negligence of a servant of the defendants, that they would be excused from liability. It was caused by a want of repair in the superstructure or road-bed between the tracks of the defendants' road, where it crossed the highway. In other words, the defendants neglected to keep a portion of their road, where it was necessary for the plaintiff to go in the discharge of his duties, in a suitable and safe condition, so that he could not pass over it without incurring the risk of injury. Now, while it is true, on the one hand, that a workman or servant, on entering into an employment, by implication agrees that he will undertake the ordinary risks incident to the service in which he is to be engaged, among which is the negligence of other servants employed in similar services by the same master, it is also true, on the other hand, that the employer or master impliedly contracts that he will use due care in engaging the services of those who are reasonably fit and competent for the performance of their respective duties in the common service, and will also take due precaution to adopt and use such machinery, apparatus, tools, appliances, and means as are suitable and proper for the prosecution of the business in which his servants are engaged, with a reasonable degree of safety to life and security against injury. Thus, an owner of a steamboat would be liable to an engineer or workman in his employment for an injury occasioned by the use of a boiler which was clearly defective and insufficient. So a manufacturer would be subjected to a like liability by the use of imperfect or badly constructed machinery. And in like manner the proprietors of a railroad would be responsible for accidents happening by tracks improperly laid, or switches which were not constructed to operate with regularity and precision. The distinction on which this rule of law is

founded is an eminently wise and just one. It is this: A workman or servant, on entering upon any employment, is supposed to know and to assume the risks naturally incident thereto; if he is to work in conjunction with others, he must know that the carelessness or negligence of one of his fellow-servants may be productive of injury to himself; and besides this, what is more material, as affecting his right to look to his employer for damages for such injuries, he knows, or ought to know, that no amount of care or diligence by his master or employer can by possibility prevent the want of due care and caution in his fellow-servants, although they may have been reasonably fit for the service in which they are engaged. It is certainly most just and reasonable that consequences which the servant or workman must have foreseen on entering into an employment, and which due care on the part of the employer or master could in no way prevent, should not be visited on the latter. But it is otherwise where injuries to servants or workmen happen by reason of improper and defective machinery and appliances used in the prosecution of a work. The use of these they could not foresee. The legal implication is, that the employer will adopt suitable instruments and means with which to carry on his business. These he can provide and maintain by the use of suitable care and oversight; and if he fails to do so, he is guilty of a breach of duty under his contract, for the consequences of which he ought, in justice and sound reason, to be responsible. Such we understand to be the rule of law and the principles on which it is founded, as now fully established by authority. *Seaver v. Boston and Maine R. R.*, 14 Gray, 466; *Cayzer v. Taylor*, 10 Id. 274, 282 [69 Am. Dec. 817], and cases cited in note.

The case at bar, if the plaintiff could be justly regarded as in the employment of the defendants, clearly falls within that branch of the rule under which the employer is held responsible for injuries caused by the use of improper or defective means for the proper performance of the work or duty to be rendered by those engaged in his service. The place where the accident happened was intended to be used for the purpose of making up trains. It was necessary for the person whose duty it was to unshackle the cars, or to fasten them together, to pass and repass over the space covered with plank between the tracks frequently and with rapidity, and with his attention in a great degree diverted from the surface over which he

passed, and directed to the special duty or service of separating and uniting the cars in order to prepare the trains for transit. The existence of such a defect as the evidence disclosed at the trial, being of a nature to obstruct the plaintiff in passing safely and rapidly over and between the tracks, and to hinder him in the performance of the service in which he was engaged, tended very strongly to show that the defendants had committed a breach of the implied obligation which rested upon them, to provide a suitable place in which the plaintiff could perform his duty safely, in the exercise of due and reasonable care, and without incurring a risk which did not come within the scope of his employment. The omission of the defendants was analogous to a failure on their part to have and maintain safe and suitable tracks, switches, or turn-outs, or to construct and keep in repair stanch and sufficient bridges. For such failure or omission they would be clearly liable in damages to a person in their employment who might be injured thereby, according to the principles and authorities already referred to. As the case stood, therefore, at the trial, there was evidence offered by the plaintiff which tended very strongly to show that the defendants had been guilty of negligence and a breach of duty, which would render them liable to the plaintiff in this action.

It is urged by the counsel for the defendants that the omission to repair the defect which occasioned the injury was the result of the negligence of the person whose duty it was to see that the planks across the highway were kept in a safe and proper condition, and that the accident was therefore caused by the carelessness of a fellow-servant. But this argument leaves out of sight the real ground on which the liability of the defendants rests. If the argument is well founded, then it would follow that, as a corporation can act only by agents or servants, it would escape all responsibility for every species of injury caused by defective machinery and apparatus, or badly constructed tracks, or insufficient bridges, and other similar causes. So an individual could avail himself of a similar immunity, if he conducted his business exclusively by agents or servants. But the rule of law does not lead to any such absurd result. The liability of the master or employer in such cases is founded, as has been already said, on the implied obligation of his contract with those whom he employs in his service. This requires him to use due care in supplying and maintaining suitable instrumentalities for the performance of

the work or duty which he requires of them, and renders him liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care, or that of his agents to whom he intrusts the duty. But it does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient.

The only remaining question is, whether there was anything in the acts or conduct of the plaintiff, at the time he received the alleged injury, which showed a want of due care on his part, sufficient to defeat his right to recover damages, and to warrant the court in withholding the case from the consideration of the jury. We think it very clear that there was not. There is a class of cases involving the question of the exercise of proper care on the part of a plaintiff, in which it is not only the right, but the duty, of the court to decide as a matter of law that the plaintiff has failed to maintain his action, and to direct a verdict for the defendant. These are cases where, upon the uncontradicted evidence, it appears that the plaintiff was guilty of a want of due care, and thus fails in proving an essential legal element in his case. In such an aspect of the evidence, it is the duty of the court to pronounce on its legal effect. It is certainly difficult, if not impossible, to lay down any general rule which shall be of easy application to every case which may arise. It may be said generally, however, that where the admitted or uncontroverted facts of a case show that the acts and conduct of a plaintiff, at the time of an alleged injury, and contributing to produce it, are such as to indicate, according to the common experience and observation of mankind, a want of due and reasonable care, adapted to the circumstances in which he is placed, he does not show any legal cause of action, and it is the duty of the court in such a state of the proof to direct a verdict for the defendant. Of this character are all the cases heretofore decided in this court, where such course has been pursued. In *Lucas v. New Bedford and Taunton R. R.*, 6 Gray, 64 [66 Am. Dec. 406], the plaintiff was injured while attempting to leave a train, after the locomotive had begun to move it. A similar state of facts was proved in *Gavett v. Manchester and Lawrence R. R.*, 16 Id. 501 [77 Am. Dec. 422]. In *Todd v. Old Colony and Fall River R. R. Co.*, 3 Allen, 18 [80 Am. Dec. 49], S. C., 7 Id. 207 [83

Am. Dec. 679], a passenger was injured in consequence of having protruded his arm outside of the window of the car while the train was in rapid motion. In *Gahagan v. Boston and Lowell R. R. Co.*, 1 Id. 187 [79 Am. Dec. 724], a traveler on the highway undertook to pass between cars in motion, propelled by an engine, having no sufficient reason for making so hazardous an attempt. In all these cases the conduct of the plaintiffs was inconsistent with that degree of common care and prudence which men ordinarily adopt when placed in similar circumstances.

But the case at bar falls within a different category. The plaintiff, when the accident occurred, was in the performance of a duty or service which required him to step between the cars and the engine of a train, for the purpose of uncoupling them by drawing the bolt which held them together. This, it appears, could not be done when the train was standing entirely still, but it was necessary for the engine to move so as to loosen the bolt sufficiently to enable him to withdraw it from its socket, and he was engaged in performing that service in the usual and ordinary mode, when he was thrown down by reason of the defect in the road. A case of this sort is not within common observation and experience, and cannot be judged of by the ordinary rule or standard applicable to persons who are only passengers or travelers, and who are engaged in no special or particular service. If, for example, a passenger should meet with an injury in attempting to pass from one car to another while the train was going at a high rate of speed, his act would be deemed by every one an imprudent one, and so manifestly wanting in proper care that he could not recover damages from the railroad company, although some negligence or want of due care on their part might have contributed to the injury. But if a conductor of a train, whose duty it is to pass from one car to another, should while doing so meet with a similar accident from a similar cause, it could not be properly said that he was guilty of negligence in passing from car to car while the train was in motion. That he was required to do by the nature of the service in which he was engaged; and the question of negligence would depend on other considerations growing out of the peculiar circumstances of the case. So, in the case at bar, if the plaintiff had been a traveler or by-stander, and without any sufficient reason or excuse had gone between the car and engine when they were in motion, and had there re-

ceived an injury, it would be too clear to admit of question, that the consequences of any accident which happened to him would fall exclusively upon himself. But as the plaintiff was in the discharge of his duty in placing himself in a perilous position,—a duty the performance of which was known to and sanctioned by the defendants,—the fact that he was in such position has no tendency to prove that he was negligent or careless. The question of due care in such case depends on the manner in which the plaintiff performed the duty incumbent on him; whether he acted with due skill and caution, and conducted himself in the usual and ordinary way in which similar acts are done by persons engaged in like employment, and on other considerations of a like character, which do not fall within the range of ordinary observation and experience. The question of negligence was therefore a proper subject of evidence, and should have been submitted, with proper instructions, to the jury, for their determination.

Nor do we think that it was any the less a question of fact to be decided by the jury because it appeared that the plaintiff had previous knowledge of the defect in the road which caused the accident: *Reed v. Northfield*, 13 Pick. 98 [26 Am. Dec. 662]; *Smith v. Lowell*, 6 Allen, 40. This certainly was a circumstance to be taken into consideration, but by no means a decisive one. If the service to be performed by the plaintiff was of a character to require that his exclusive attention should be fixed upon it, and that he should act with rapidity and promptness, it could hardly be expected that he should always bear in mind the existence of the defect, or be prepared at all times to avoid it.

It may be suggested that the plaintiff ought not to recover because he continued in the performance of his duties after he was aware of the existence of the defect in the road. There may be cases where a servant would be wanting in due care by incurring the risk of injury in the use of defective or imperfect machinery or apparatus after he knew it might cause him bodily harm. But we do not think this case is one of that class. His continuance in the employment did not necessarily and inevitably expose him to danger.

On the whole case, as presented to us, we are of opinion that the verdict for the defendants should be set aside, and a new trial granted.

312, and extended note thereto 218-225, upon the subject, and discussing several points in the syllabus, *supra*; *Pennsylvania R. R. Co. v. Aspell*, 62 Id. 323; *Noyes v. Smith*, 65 Id. 222; *Mad River etc. R. R. Co. v. Barber*, 67 Id. 312; *Cayzer v. Taylor*, 69 Id. 317, and notes to these cases.

RAILROADS ARE ANSWERABLE FOR EVERY INJURY CAUSED BY DEFECT IN ROADS, CARS, OR ENGINES, OR BY ANY NEGLIGENCE, HOWEVER SLIGHT, OF THE COMPANY OR ITS AGENTS: *Pennsylvania R. R. Co. v. Aspell*, 62 Am. Dec. 323.

MASTER'S CARE AND DUTY IN SUPPLYING SERVANTS, INSTRUMENTALITIES, AND APPLIANCES: See extended note to *Bussell v. Laconia Mfg. Co.*, 77 Am. Dec. 222; *Noyes v. Smith*, 65 Id. 222; *Mad River etc. R. R. Co. v. Barber*, 67 Id. 312; *Cayzer v. Taylor*, 69 Id. 317; *Smith v. New York etc. R. R. Co.*, 75 Id. 305; *Nashville etc. R. R. Co. v. Elliott*, 78 Id. 506, and notes to these cases.

SERVANT ASSUMES RISKS OF EMPLOYMENT WHEN: See extended note to *Bussell v. Laconia Mfg. Co.*, 77 Am. Dec. 222; *Noyes v. Smith*, 65 Id. 222; *Illinois Cent. R. R. Co. v. Cox*, 71 Id. 298; *Nashville etc. R. R. Co. v. Elliott*, 78 Id. 506.

MASTER'S LIABILITY FOR INJURY DONE BY ONE SERVANT TO ANOTHER: *Fox v. Sandford*, 67 Am. Dec. 587, and extended note thereto 588-597; extended note to *Murray v. South Carolina R. R. Co.*, 36 Id. 279-290; note to *Illinois Cent. R. R. Co. v. Cox*, 71 Id. 304; *Washburne v. Nashville etc. R. R. Co.*, 75 Id. 784; *Cooper v. Mullins*, 76 Id. 638; *Fraser v. Pennsylvania R. R. Co.*, 80 Id. 467, and collected cases in note thereto 470; *Nashville etc. R. R. Co. v. Elliott*, 78 Id. 506; note to *Gillemwater v. Madison etc. R. R. Co.*, 61 Id. 106; *Brackett v. Sublee*, 81 Id. 694; *Ryan v. Fowler*, 82 Id. 315; *Korak v. City of Ottawa*, 83 Id. 255; *O'Connell v. Baltimore etc. R. R. Co.*, 83 Id. 549.

NEGLIGENCE—NONSUIT OR VERDICT FOR DEFENDANT MAY BE DIRECTED WHEN: See *Warren v. Fitchburg R. R. Co.*, *ante*, p. 700, and cases cited in note thereto.

CONTRIBUTORY NEGLIGENCE SUFFICIENT TO WITHDRAW CASE FROM JURY: See *Warren v. Fitchburg R. R. Co.*, *ante*, p. 700, and cases cited in note thereto.

THE PRINCIPAL CASE WAS CITED IN EACH OF THE FOLLOWING AUTHORITIES AND TO THE POINT STATED: It is a master's duty to provide proper structures and engines; to select proper, competent, and suitable servants; to provide proper and safe machinery; to keep the engines with which, and the buildings, places, and structures in, upon, or over which, his business is carried on in a fit and safe condition; to provide a suitable place in which his servant, being himself in the exercise of due care, can perform his duty safely, or at least without exposure to dangers that do not come within the obvious scope of his employment; and, in short, to provide proper materials, and suitable tools, machinery, and all other instrumentalities upon or by means of which an employment is to be carried on; and unless he uses reasonable care in doing this, he will be liable to any of his servants for injuries suffered by them by reason of his negligence in this respect; and this includes his liability to any of their fellow-servants for his negligence in these respects: *Gilman v. Eastern R. R. Corp.*, 10 Allen, 238; *Holden v. Fitchburg R. R.*, 129 Mass. 276; *Indiana Car Co. v. Parker*, 100 Ind. 192; *Lake Erie etc. R'y Co. v. Kneadle*, 94 Id. 456; *Coombs v. New Bedford Cordage Co.*, 102 Mass. 584; *Felch v. Allen*, 98 Id. 574; *Curley v. Harris*, 11 Allen, 121. And so, whether the master be a natural person or a corporation: *Holden v. Fitchburg R. R.*, 129 Mass. 276. And this liability extends to unsafe and dangerous places in railroad tracks: *Lake Erie etc. R'y Co. v. Kneadle*, 94 Ind. 456. And a master must supervise, ex-

amine, and test his machines as often as custom and experience require: *Indiana Car Co. v. Parker*, 100 Id. 192. The question as to whether plaintiff used due care, in actions for negligence, should be submitted to the jury under proper instructions, especially where the case presents a variety of circumstances to be considered in connection with each other, and depends partly upon inferences of fact to be drawn from these circumstances: *Quirk v. Holt*, 99 Mass. 167; *Weare v. Fitchburg*, 110 Id. 339. Thus, the mere fact that a youthful employee could have seen that a place in which he was set to work was dangerous and hazardous by exercising his faculty of sight, is not, of itself, sufficient evidence to hold the employee accountable for contributory negligence. It is a question for the jury: *Hill v. Gust*, 55 Ind. 49. So, where the plaintiff had seen a wagon in the road in the daytime, but collided with it the following night, which was dark, by running against it with his own vehicle, the fact that the plaintiff had seen the wagon in the same place in the course of the day, and before the accident happened, does not necessarily show that he was wanting in due care: *Fox v. Sackett*, 10 Allen, 536. The court cannot take from the jury a case in which the evidence is conflicting, and the testimony of one or more witnesses, if believed, would, taken by itself, support a verdict: *Reed v. Inhabitants of Deerfield*, 8 Id. 524. If the incapacity of an agent or the insufficiency of a structure is known to the master, or has existed so long or under such circumstances that, exercising due care, he ought to have known it, he is responsible: *Gilman v. Eastern R. R. Co.*, 13 Id. 442. If any want of repair, however, as in keeping floors in repair, has not existed for so long a time as to show absolute negligence on the part of the defendants, then an injury sustained by a workman employed by a corporation, while aiding other workmen, by request of his foreman, in removing a heavy machine into a room by means of trucks, one wheel of which broke through the floor and thus led to the injury, is attributable to the negligence of an agent or servant in the service of a common employer with the plaintiff, and the principle of law that an employee injured by the negligence of others in the service of the same employer, while he was acting in the discharge of his duty, and all acting in a common service, would not apply: *Cooper v. Hamilton Mfg. Co.*, 14 Id. 196. If a master of ordinary prudence does not believe a defect dangerous, his servant may disregard it without losing his right to complain, if, while pursuing his ordinary course, he suffers from such defect: *Colorado Cent. R. R. Co. v. Ogden*, 3 Col. 504. Defendants are liable in damages to the plaintiffs, if they caused an unlawful obstruction to public travel in the highway, whereby injuries were occasioned to the plaintiff's property. And this liability exists, notwithstanding a party may also have a remedy against the town or city where such obstruction is permitted: *Gillett v. Western R. R. Corp.*, 8 Allen, 562. The principal case was cited in support of the correctness of the instructions given in *St. Louis etc. R'y Co. v. Valerius*, 56 Id. 520. There seems to be no holding in New York that a railroad company is bound to furnish a safe road-bed, or in default thereof to be liable for an injury to one of its employees by reason of such default: *Tinney v. Boston etc. R. R. Co.*, 62 Barb. 219, 220. The principal case was quoted from in *Chicago etc. R. R. Co. v. Gregory*, 58 Ill. 287, and distinguished in *Ladd v. New Bedford R. R. Co.*, 119 Mass. 414. Unimportant citations of it were made in *Morse v. Glendon Co.*, 125 Id. 286; *Arboreen v. Dennison*, 117 Id. 411.

STRONG v. CONVERSE.

[8 ALLEN, 557.]

WIDOW OF GRANTOR IS NOT ENTITLED TO DOWER, AS AGAINST MORTGAGEES and those claiming under him, in her husband's land conveyed by a deed of warranty, subject to a mortgage covering the entire value of the property, so long as the mortgage remains undischarged.

GRANTEE NOT BOUND TO PAY OFF MORTGAGE. — Grantee's purchase of land, conveyed to him by deed of warranty, subject to a mortgage, does not import a promise on his part to pay such mortgage, nor does he thereby undertake or become bound to pay it off.

PAYMENT OF MORTGAGE BY GRANTEE AND TAKING ASSIGNMENT TO HIMSELF IS NO DISCHARGE. — Where land has been conveyed by a deed of warranty, subject to a mortgage, and the grantee pays off the mortgage and takes an assignment thereof to himself, the mortgage is not thereby discharged, nor can the widow of the grantor maintain a writ of dower against him.

WRIT of dower, brought by the widow of Chester Strong. It appeared that in June, 1849, Cyrus Knox and wife were seised in fee of the premises, and conveyed them to Harvey Strong and Chester Strong, as tenants in common. Said H. and C. Strong mortgaged the premises to Knox and wife to secure the sum of seven hundred dollars, with interest, that being the entire consideration of the purchase. In September, 1853, said H. and C. Strong conveyed the premises to the tenant, Converse, by deed of warranty, subject to said mortgage. The demandant, Lucia E. Strong, did not sign either of said deeds. In September, 1857, the tenant recovered judgment against said H. and C. Strong for possession of the premises, was put in possession thereof in November, 1857, and remained in peaceable possession. The tenant, in January, 1859, purchased the mortgage to Knox and wife, and took an assignment thereof to himself, paying therefor the full amount of the original note and interest from its date, nothing having ever been paid thereon. In February, 1863, the demandant's husband died, and in May of that year she demanded her dower. Judgment for tenant, and demandant appealed.

J. Wells and J. G. Allen, for the demandant.

C. A. Winchester and H. Morris, for the tenant.

By Court, DEWEY, J. The estate passed to Knox and wife by the mortgage deed of Harvey Strong and Chester Strong, free from any claim to a right of dower in the demandant so long as that mortgage remained undischarged. If that title

still exists, and is now legally held by the tenant, it constitutes a good defense to the present action.

The fact that the tenant became the owner of the equity of redemption would not in itself defeat the right to hold the mortgage title free from the claim of dower. The fact that he purchased the equity of the mortgagor, taking a conveyance by a warranty deed, "subject to the mortgage," would not affect his right to hold the mortgage as assignee by an after-acquired title, with all the rights of the original mortgagee. A purchase of an equity of redemption is always a purchase of an estate subject to a mortgage. But the taking of a deed with the recital that the premises are subject to a mortgage does not import a promise on the part of the grantee to pay such mortgage.

The further inquiry is, whether this mortgage has been paid and discharged. It is said, on the part of the demandant, that such was the effect of the acts of the tenant in January, 1859, when, according to the statement of facts, the tenant purchased the mortgage to Knox and wife, and took an assignment thereof to himself, paying therefor the full amount of the original note, and interest from its date, nothing having ever been paid thereon. Upon a careful revision of the cases to which we have been referred by the counsel for the demandant, we think they fail to sustain the position that this transaction amounted to a payment and discharge of the mortgage. It differs from many of them in the fact that this was a purchase, and in form an assignment of the mortgage. It differs from the cases where there was an agreement on the part of the purchaser of the equity that he would pay and redeem the mortgage.

It was said by this court in *Brown v. Lapham*, 3 Cush. 554, 555: "If the money is advanced by one whose duty it is by contract or otherwise to pay and cancel the mortgage and relieve the mortgaged premises of the lien, a duty in the proper performance of which others have an interest, it shall be held to be a release and not an assignment, although in form it purports to be an assignment. Where no such controlling obligation or duty exists, such an assignment shall be held to constitute an extinguishment or an assignment, according to the intent of the parties, and their respective interests in the subject will have a strong bearing upon the question of such intent." Upon examining the facts in this case, we find no obligation on the part of the defendant to pay this mortgage,

and his interest clearly required him to hold the same by assignment, as this was the only effectual mode to secure his rights against a claim of dower in the entire estate, discharged of the mortgage. As the holder of the equity of redemption, and to make the same effectual, he might well purchase the mortgage and take an assignment of the same, paying therefor the amount of the original note, with interest, without reviving the right of dower, which had been legally barred, or, as in the present case, had never existed, to the extent of the debt secured by the mortgage: *Popkin v. Bumstead*, 8 Mass. 491 [5 Am. Dec. 113]; *Gibson v. Crehore*, 3 Pick. 475; *Hunt v. Hunt*, 14 Id. 383 [25 Am. Dec. 400]. The result is, therefore, that as the tenant holds the right of the mortgagee, the demandant cannot maintain this action.

Judgment for the tenant.

RIGHT OF DOWER IN MORTGAGED PREMISES: See extended note to *Hitchcock v. Harrington*, 5 Am. Dec. 232-237; *Hawley v. Bradford*, 37 Id. 390, and note 392; *Smith v. Stanley*, 58 Id. 771, and note 773; *McCabe v. Bellows*, 66 Id. 467, and notes 469.

PAYMENT OF MORTGAGE BY GRANTEE, AND TAKING ASSIGNMENT TO HIMSELF, EFFECT OF: See extended note to *Hitchcock v. Harrington*, 5 Am. Dec. 232-237; note to *McCabe v. Bellows*, 66 Id. 470.

THE PRINCIPAL CASE WAS CITED in each of the following authorities and to the point stated: A stipulation in a deed that it is subject to mortgage and judgment liens does not prevent the grantee from buying in a mortgage or judgment for the protection of his title: *Rooker v. Benson*, 83 Ind. 260. If one buys land by a warranty deed, subject to a mortgage, without any recital that he assumes or agrees to pay the mortgage, he is not bound to do so; and if he takes an assignment of the mortgage to himself, the mortgage is not thereby discharged: *Tucker v. Crowley*, 127 Mass. 401. Where land is conveyed subject to a mortgage, the grantee does not undertake, or become bound by the mere acceptance of the deed, to pay the mortgage debt. In the absence of other evidence, the deed shows that he merely purchased the equity of redemption: *Fiske v. Tolman*, 124 Id. 256. When a purchaser pays off a mortgage, to which the right of dower would be subject, merely to clear the estate of the encumbrance, and not by virtue of any obligation to pay the mortgage debt, and takes an assignment, or a conveyance of his interests from the mortgagee, he may stand on the mortgage title, if he please, and thus defeat the claim of dower until redemption is made, as no dower can then be assigned without payment of the whole mortgage debt by the demandant: *McCabe v. Swap*, 14 Allen, 191; *Toomey v. McLean*, 105 Mass. 124. The purchaser of an equity of redemption from an assignee in insolvency of the mortgagor, who takes an assignment of the mortgage, may set up the mortgage and its foreclosure against a claim of dower made by one who joined in the mortgage for the purpose of releasing it: *Pitts v. Aldrich*, 11 Allen, 41. A mortgage is not discharged by its assignment to one of two tenants in common of the equity of redemption, and may be foreclosed by the assignee: *Barter v. Flood*, 103 Mass. 474.

INHABITANTS OF MILFORD v. HOLBROOK.

[9 ALLEN, 17.]

OWNER OF BUILDING IS BOUND TO INDEMNIFY TOWN FOR DAMAGES recovered against it for injuries sustained by a third person by reason of the defective and unsafe condition of an awning extending across the sidewalk along the whole front of the building, the lower story of which is occupied by shops, for the advantage of which such awning was built and maintained, where the owner has leased the whole of the lower story and a part of the upper story, but has himself remained in possession of the residue of the upper story, there being no express agreement with the tenants that they should keep the awning in repair.

NOTICE BY TOWN TO OWNER OF BUILDING OF ACTION BROUGHT AGAINST IT to recover damages for an injury sustained on the sidewalk in front of his building is sufficient, where it describes the building and requests him to defend the action, and states that if the town is liable he will be responsible to it, because the injury, if it occurred, must have occurred through his negligence.

OWNER OF BUILDING WHO IS ALSO OCCUPANT OF PART OF IT IS LIABLE FOR INJURY resulting from his failure to keep in repair an awning extending the whole length of the building, although there be no agreement between him and the tenants of the residue of the building that he should keep the awning in repair.

JUDGMENT RECOVERED BY THIRD PERSON AGAINST TOWN FOR INJURIES SUSTAINED BY REASON OF DEFECTIVE AWNING over the sidewalk is conclusive upon the owner of the awning bound to keep the same in repair, and who has had notice of the pendency of the action, and that the town would hold him to answer over, upon the points that the awning was defective, that the person suffered injury while exercising due care, and that he suffered damage to the amount of the judgment.

TORT to recover of the defendant the amount recovered against the plaintiffs by one Day for an injury sustained by reason of a defect over and in a public sidewalk in Milford. The notice referred to in the opinion was in these words: "Sir: You are hereby notified that Cornelius T. Day, of Milford, has commenced an action against the inhabitants of the town of Milford for damages alleged to have been sustained by him by reason of an injury alleged to have been sustained by him on the sidewalk in front of or near Union Block, so called, in Milford, by writ returnable before the next superior court for the county of Worcester, and you are hereby required to defend said action at your own expense and cost, because, if the defendants are liable at all, you are responsible to them, as the injury, if it occurred, must have occurred by your negligence; and if you do not defend it, they will claim to be reimbursed by you if judgment is obtained against them therefor." The judge at the trial charged that the verdict in the former action was binding on the defendant in this action as

to the existence of a defect in the highway, the injury to Day while using due care, and the amount of such injury. The jury returned a verdict for the plaintiffs, and the defendant alleged exceptions. The other facts are stated in the opinion.

F. H. Dewey and H. B. Staples, for the defendant.

P. C. Bacon and P. E. Aldrich, for the plaintiffs.

By Court, HOAR, J. The principal question presented by the bill of exceptions is, whether the defendant was in such a sense the occupant of the building called "Union Block," and the awning attached to it, as to be responsible for its defective and unsafe condition, and bound to indemnify the plaintiffs for the damages recovered against them by Day. The law applicable to the point has been very distinctly stated in several adjudged cases in this commonwealth; and the only difficulty is in its application to the particular state of facts in proof. The rule is, that the occupier, and not the landlord, is bound, as between himself and the public, so far to keep buildings in repair that they may be safe for the public; but if the landlord is bound by express agreement with the tenant to repair, the party injured by a defect or want of repair may have his action against the landlord in the first instance, to avoid circuitry of action: *Lowell v. Spaulding*, 4 Cush. 277 [50 Am. Dec. 775]; *Boston v. Worthington*, 10 Gray, 496 [71 Am. Dec. 678]; *Kirby v. Boylston Market Association*, 14 Id. 249 [74 Am. Dec. 682]. We are then to consider whether there were any such occupier of this awning, to the exclusion of the defendant, at the time the damage occurred, as would exempt him from responsibility. And we think that the facts admitted and proved, although wanting some of the elements which governed the decision in *Kirby v. Boylston Market Association*, 14 Id. 249 [74 Am. Dec. 682], are sufficient to bring the case within the reason of that decision, and that the ruling at the trial was right.

The defendant owned the whole building, and all parts of it which were not leased to other persons remained in his own occupation. On the lower story were three shops, and a doorway and staircase leading to the rooms above. The awning was an entire structure, extending over the sidewalk across the whole front of the building. There was evidence that it was built and maintained for the advantage of the shops; but there was no evidence that it was expressly leased with them,

or either of them. Certainly, the part extending over the doorway leading to the upper story was used in connection with that, and would furnish protection and convenience to persons resorting to the upper rooms. One of those rooms was leased to the town for a public library, and another to a fire company. The hall and a room opposite were in the defendant's possession under the care of an agent, and let from time to time for temporary purposes. The town and fire company would, of course, have a right of passage by the stairs and entry in common with persons resorting to the hall, and with the defendant himself. There was obviously, therefore, no such leasing of the upper story to tenants as would exonerate the landlord from all responsibility for the whole building; nor, as we think, as would create any responsibility in the fire company or the town for the condition of the passages leading to the rooms which they hired. That responsibility remained with the general owner and partial occupant. And in view of all these facts, we think his liability for the awning is like that which he would be under for the condition of the roof, the eaves, the chimneys, or other parts of the building not appropriated to the exclusive use of any particular tenant, or to all of them, to the exclusion of the landlord.

It would seem to make no difference in the result whether the liability of the landlord, if it exists at all, is exclusive or in common with an equal one on the part of the lessees of the stores; because in an action of tort the nonjoinder of defendants is no defense.

The remaining exceptions do not seem to us well founded.

The notice to the defendant to take upon himself the defense of the former suit was sufficiently full and precise.

The instructions as to the effect of the former judgment were precisely in accordance with the rule given in *Boston v. Worthington*, 10 Gray, 496 [71 Am. Dec. 678], above cited.

The plaintiffs were not *in pari delicto* with the defendant, and therefore the principle that one joint wrong-doer cannot have contribution against another had no pertinency. The only fault or negligence which could be imputed to the town, on the facts shown, was a failure to remedy the nuisance which the defendant had caused. This is no bar to their claim for indemnity: *Lowell v. Boston and Lowell R. R.*, 23 Pick. 24 [34 Am. Dec. 33]; *Lowell v. Short*, 4 Cush. 275.

There was no need of submitting to the jury the question whether the defendant agreed to repair the awning, as he was

rightly held to be liable without reference to such an agreement.

The evidence which was offered by the defendant, and rejected, to prove that the fall of the awning was not caused by its own insufficiency, and that he was not chargeable with negligence, namely, that it was caused by an extraordinary fall of snow on the day and evening before, was inconsistent with the conclusive effect of the prior judgment on the question of the defect in the way. The only defect charged was an awning insufficient to sustain the weight of snow to which it might reasonably be expected to be exposed. It was the plaintiffs' duty to clear the awning when more snow was upon it than it could bear, unless the fall of snow was so extraordinary and sudden that no one would be responsible for it.

Exceptions overruled.

MUNICIPAL CORPORATION CAN RECOVER FROM OWNER OF BUILDING who has permitted the highway in front thereof to be out of repair, by reason whereof a traveler has sustained injury, the amount of the judgment which the latter has recovered against it, and such judgment is conclusive upon such owner, who has had notice of the pendency of the action against the city, and that it would hold him to answer over, upon the points that the highway was defective, that the person suffered injury while exercising due care, and that he suffered damage to the amount of the judgment: *City of Boston v. Worthington*, 71 Am. Dec. 678, note 681; *Woburn v. Boston & L. R. R. Corp.*, 109 Mass. 285, citing the principal case; *Littleton v. Richardson*, 66 Am. Dec. 759, note 765; *City of Lowell v. Spaulding*, 50 Id. 775.

OWNER OF LEASED PREMISES WHO RETAINS CONTROL OF ANY PART THEREOF is liable for injuries caused to third persons by reason of his failure to repair the premises, or to keep them in a safe condition: *Kirby v. Boylston Market Association*, 74 Am. Dec. 682, note 684, where other cases are collected; *Commonwealth v. Watson*, 97 Mass. 564; *Shipley v. Fifty Associates*, 101 Id. 252; *Gray v. Boston G. L. Co.*, 114 Id. 153; *Readman v. Conway*, 126 Id. 376, 377; *Looney v. McLean*, 129 Id. 35, all citing the principal case. But as a general rule the lessee, and not the landlord, is primarily liable, unless the latter is bound by agreement to repair: *Kirby v. Boylston Market Association*, 74 Am. Dec. 682, note 684, and cases cited; *Woburn v. Henshaw*, 101 Mass. 199, citing the principal case. A city is not *in pari delicto* with the owner of a building who permits the sidewalk in front of it to be out of repair, where the only fault or negligence that can be imputed to it was a failure to remedy the nuisance which such owner had caused: *West Boylston v. Mason*, 102 Id. 343, also citing the principal case.

THE PRINCIPAL CASE IS ALSO CITED IN *Westfield v. Mayo*, 122 Mass. 104, to the point that a notice to an owner of a building through whose neglect to repair an injury has been sustained, of a suit against the city by the party injured, specifying the place of the accident and requesting him to defend, is sufficient.

KENT v. WHITNEY.

[9 ALLEN, 62.]

PRICE FOR WHICH GOODS SOLD AT AUCTION IS ADMISSIBLE AS EVIDENCE of their value.

NEW TRIAL SHOULD BE HAD UPON QUESTION OF DAMAGES ONLY, where the exceptions which are sustained relate to that question solely.

TORT to recover for the conversion of certain household furniture seized and sold upon an execution in favor of the defendant against the plaintiff's husband. On the trial, it appeared that the goods were sold by the officer, and that the sale was conducted fairly in all respects. For the purpose of showing the real value of the goods, the defendant offered to prove the price for which each article was sold; but the evidence was excluded. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

P. E. Aldrich and P. C. Bacon, for the defendant.

F. H. Dewey, for the plaintiff.

By Court, BIGELOW, C. J. There can be no doubt that the plaintiff is entitled to recover in the action the full value of the property which was wrongfully taken and converted by the defendant. To prove this value, evidence of the prices for which the articles sold was clearly competent. Such evidence is held to be admissible when the value of land is the question at issue: *Wyman v. Lexington etc. R. R.*, 13 Met. 316, 326. And we can see no good reason why it is not equally competent as having a tendency to show the value of chattels. A sale is matter of fact, not of opinion, and is direct evidence of the real worth of the thing sold. Indeed, the price for which an article is bought and sold constitutes its market value, and is ordinarily the best and most satisfactory standard by which to estimate the amount at which the same or similar articles are to be appraised in the assessment of damages. The competency of such evidence cannot be made to depend on the form or mode or particular terms of the contract of sale. These circumstances may have an essential bearing on the weight to be given to the fact of sale as affecting the price and as indicating the true value of the property, and they are proper for the consideration of the jury. But they cannot operate to exclude the evidence altogether. In many cases a sale by auction would furnish very strong if not decisive evidence of value. An auction of stocks, for example, at the

public exchange in a large commercial city, affords the truest standard of the prices at which they are estimated in the market; on the other hand, a similar sale of the same kind of property in an obscure village, attended only by a few persons, might be very feeble and unsatisfactory evidence of the real value of the shares. No one can doubt that the fact of the former sale would be admissible on the question of value. Equally so would be the latter. The evidence is of the same species in both instances; the only difference between them is in the weight to which the fact is entitled. This consideration disposes of the arguments urged against the competency of the evidence which was rejected at the trial of the case at bar. It is said that the sale of the property in controversy was a forced one, under legal process, in which the necessity of disposing of the property would take away one of the essential features by which prices are fixed and regulated, inasmuch as the seller could have no voice in fixing the sum at which each article was sold. This is an argument which goes to the weight, not to the competency, of the evidence. It would apply with equal force to every sale at auction, which, when fairly conducted, whether under legal process or not, if no minimum price is fixed on the property offered, is made to the highest bidder, the seller having no option as to taking or refusing the price offered. But such sales are nevertheless ordinarily supposed to be a fair test of value, the inference being a reasonable one and according to common experience, that competition among purchasers will carry the price up to the real worth of the property offered.

No case has been cited by the counsel for the plaintiff, nor after some research have we been able to find one, which tends to sustain the ruling of the court respecting the evidence which was offered at the trial. There are authorities which go to the extent of holding that in certain cases a party cannot be allowed to recover in damages for property taken from him a sum greater than that for which it was sold at auction by the defendant. For instance, when goods have been seized and sold after bankruptcy by some person who fails to maintain title to them, if the sale was *bona fide*, it has been decided that assignees are entitled only to the amount produced by the sale, and not to the full value of the goods, for the reason that they would themselves have been obliged to sell the property if it had been in their possession: *Whitmore v. Black*, 13 Mees. & W. 507; *Whitehouse v. Atkinson*, 3 Car. & P. 344. In these

cases we find no suggestion that a sale by auction is not evidence of the value of property. On the contrary, it is taken as the measure of the liability of the wrong-doer. In another class of cases, where it is held that a party is liable for the full value of the property tortiously taken by him, the price at which it sold at auction has been admitted as competent, though not conclusive, evidence of its value.

Although the evidence offered by the defendant was erroneously rejected, we are of opinion that he is not entitled to a new trial of the whole case. The evidence which the court refused to admit had no bearing whatever on the title to the property in question, or its conversion by the defendant. These questions have been settled by the verdict of the jury, under rulings to which no exception has been taken, and they ought not to be again opened: *Winn v. Columbian Ins. Co.*, 12 Pick. 279, 288; *Robbins v. Townsend*, 20 Id. 351. The evidence rejected had reference solely to the question of damages, and justice will therefore be done by entering the order.

Exceptions sustained; new trial as to damages only.

NEW TRIAL WILL BE GRANTED AS TO PART OF CAUSE ONLY, as, for instance, as to damages only, when such course is just: *Fitzgerald v. Jordan*, 11 Allen, 130; *Burton v. Wilmington & W. R. R. Co.*, 84 N. C. 201, both citing the principal case, although the latter cites it erroneously as 9 Pick. 62, instead of 9 Allen, 62. A new trial should be limited to that alone in which there is error: *Patton v. City of Springfield*, 99 Mass. 635, also citing the principal case.

AMOUNT FOR WHICH PROPERTY SOLD AT AUCTION is competent evidence of its value at the time of the sale: *Brigham v. Evans*, 113 Mass. 540, citing the principal case.

GEORGE v. WOOD.

[9 ALLEN, 60.]

MORTGAGEE OF LAND MAY RELEASE PART THEREOF FROM OPERATION OF HIS MORTGAGE without impairing his security upon the remainder, if, at the time he executes such release, he has no notice, actual or constructive, of a prior conveyance of a portion of such remainder, made by the mortgagor to a third person; and the record of such prior conveyance is not constructive notice thereof to him.

RIGHT TO CONTRIBUTION FROM SUBSEQUENT GRANTEE OF PORTION OF MORTGAGED PREMISES cannot be settled in a suit in equity to redeem from the mortgage, unless such grantee is made a party to the bill.

BILL in equity, to redeem land from a mortgage. The parties agreed upon the following facts: In August, 1853, Nathaniel Chessman mortgaged a tract of land in Milford to Asa Wood,

the defendant's intestate, to secure a sum of money which has never been paid, unless the release hereinafter mentioned from the defendant to Chessman operated as a payment thereof. Asa Wood afterwards died, and in January, 1856, the defendant was appointed administratrix of his estate. In May, 1855, Chessman mortgaged a part of the land, described as bounded on land of Daniel Finley, with full covenants of warranty, to the plaintiff to secure a sum of money, which remains wholly unpaid. This mortgage was recorded in May, 1855. In August, 1856, Chessman conveyed another portion of the land to Crawford Pierce by deed of warranty, duly recorded in November, 1856. In February, 1857, Chessman conveyed another portion of the land to Daniel Finley by a deed of quitclaim, duly recorded in March, 1857. On the same day that the deed to Finley was executed, the defendant released and discharged the lot conveyed to Pierce, describing it as running "to the southerly corner of land of Daniel Finley," from the operation of the mortgage to Asa Wood, by her deed of quitclaim to Chessman, recorded on the 16th of March, 1857. In 1855, Chessman sold to Finley the lot described in the deed to the latter of February, 1857; and Finley claimed to have had a warranty deed thereof, which was lost. There was no evidence that the defendant, at the time of executing her release to Chessman, had any actual knowledge of the conveyance to the plaintiff, or of that to Finley. The case was reserved for the determination of the whole court.

P. C. Bacon and P. E. Aldrich, for the plaintiff.

T. G. Kent, for the defendant.

By Court, HOAR, J. It must be considered as settled that when the owner of an equity of redemption conveys by deed of warranty a part of the mortgaged premises, neither he, nor his heirs, nor subsequent grantees with notice of the remaining part of the mortgaged premises, are entitled in equity to contribution from the first grantee, toward payment of the mortgage debt: *Chase v. Woodbury*, 6 Cush. 143; *Bradley v. George*, 2 Allen, 392; *George v. Kent*, 7 Id. 16; *Kilborn v. Robbins*, 8 Id. 466. The land remaining in the mortgagor is first chargeable; and the equity of his vendee will be enforced against any subsequent purchaser from him with notice: *Allen v. Clark*, 17 Pick. 47.

The weight of authority seems to be that this equity of a purchaser from the mortgagor is one which the mortgagee

must regard, if he has actual or constructive notice of it: *Parkman v. Welch*, 19 Pick. 231; *Brown v. Simons*, 44 N. H. 475; 1 Washburn on Real Property, 572, and cases cited; 4 Kent's Com., 8th ed., 189, note. If the mortgagee, therefore, releases a part of the mortgaged estate to a purchaser, he must abate a proportionate part of the mortgage debt, if it be necessary to protect a prior purchaser, of whose title he had notice when he made the release. The equities between successive purchasers from the mortgagor will be in the order in which they take their conveyances, if the subsequent purchasers have notice of those which precede: *Guion v. Knapp*, 6 Paige, 35 [29 Am. Dec. 741]; *Clowes v. Dickenson*, 5 Johns. Ch. 235; S. C., 9 Cow. 403.

These principles must govern the rights of the parties to this suit; and the first question is, whether the defendant, when she executed the release of the lot purchased by Pierce, had notice of the prior conveyance to the plaintiff. His conveyance was on record, which he contends was constructive notice. The release was to the original mortgagor, and there is no proof of any other notice than the record of the plaintiff's deed. It has been held in New York that the recording of a second mortgage is not constructive notice to the mortgagee under a first recorded mortgage: *Wheelwright v. Depeyster*, 4 Edw. Ch. 232; *Talmadge v. Wilgers*, 4 Id. 239, note; *Cheesebrough v. Millard*, 1 Johns. Ch. 409 [7 Am. Dec. 494]; *Stuyvesant v. Hone*, 1 Sand. Ch. 419. The same doctrine has prevailed in Pennsylvania: *Taylor v. Maris*, 5 Rawle, 51. And it was adopted by Mr. Justice McLean, of the supreme court of the United States: *McLane v. Lafayette Bank*, 3 McLean, 603.

The question is not free from difficulty, but we are not aware of any adjudged case to the contrary; nor indeed, of any case in which the record of a deed has been held to be constructive notice to any persons other than subsequent purchasers or those claiming title under the same grantor: 2 White & Tudor's Lead. Cas. Eq., Am. ed., 193. In *Parkman v. Welch*, 19 Pick. 231, it is to be observed that no question seems to have been suggested in the argument or decision as to the necessity of any notice to the mortgagee; and no allusion is made in the opinion to the effect of any prior equity resulting to the prior purchaser from the mortgagor. The case apparently rests upon the idea that all parts of the mortgaged premises were equally liable to contribute in proportion to their value,

in the hands of separate purchasers, without regard to priority; and that the release of one parcel by the mortgagee would be a discharge *pro tanto* of the mortgage. In these respects it is not easy to see how the case can be reconciled with *Allen v. Clark*, 17 Pick. 47, and it is certainly inconsistent with the recent decisions of this court to which reference has been made. But these points, although necessarily involved in the decision, were not brought to the attention of the court; and the case of *Allen v. Clark*, *supra*, was decided before the justice who gave the opinion in *Parkman v. Welch*, 19 Id. 231, came upon the bench, and had not then been reported.

In *Brown v. Worcester Bank*, 8 Met. 47, the right of a prior purchaser of a part of an equity of redemption to exemption from contribution to purchasers of the residue was not noticed by Mr. Justice Wilde, who gave the opinion in *Allen v. Clark*, 17 Pick. 47, although it apparently existed. But it is now firmly established as a rule in equity in this commonwealth.

When, however, the purchaser seeks to enforce his equity against the mortgagee, it is reasonable to require strict proof of notice. He takes his title with full knowledge that it is subject to the mortgage; and if he does not perfect it by a release, he ought not to subject the mortgagee to the constant necessity of investigating transactions between the mortgagor and third persons subsequent to the mortgage, in order to protect him; when by giving notice he can so easily protect himself. The establishing of such mere collateral equities, which do not affect the legal title, cannot be considered as within the purposes intended to be accomplished by the statutes for registration of deeds.

The only remaining point which has been argued relates to the priority of equities between the plaintiff and Finley. The plaintiff contends that Finley's title preceded the grant to Pierce; and that the release to Pierce being made with notice of Finley's title, as shown from the recital in the release that the land bounded on a corner of Finley's land, discharged Finley from the obligation to pay the proportion of the mortgage which should have been borne by the Pierce lot; and that as Finley's title was subsequent to the plaintiff, the plaintiff is deprived of any right of subrogation against him. But the facts do not find when Finley's title was acquired or his purchase-money paid. The only deed to Finley, which, it is agreed, ever existed, was subsequent to both the plaintiff's and Pierce's. If the recital in the release is proof of an earlier

title, the similar recital in the plaintiff's deed would prove in like manner that Finley had a priority over the plaintiff. But we think a conclusive answer is, that this question of contribution cannot be settled without making Finley a party to the suit, which the plaintiff has not done: *Avery v. Petten*, 7 Johns. Ch. 211.

MORTGAGEE HAVING NO NOTICE OF ALIENATION OF PART OF MORTGAGED LAND does not lose his lien thereon by releasing another part of it: *Guion v. Knapp*, 29 Am. Dec. 741, note 747.

WHERE MORTGAGEE, WITH NOTICE OF ALIENATIONS OF PARTS OF MORTGAGED PREMISES, RELEASES that part which is primarily liable for the payment of the mortgage debt, he cannot charge other portions of the premises with the payment of the mortgage, without deducting the value of the part released: See *Gaskill v. Sine*, 78 Am. Dec. 105, note 107; *Pike v. Goodnow*, 12 Allen, 474, citing the principal case.

RECORDING OF SECOND MORTGAGE, WHEN DOES NOT OPERATE AS CONSTRUCTIVE NOTICE: See *Vanorden v. Johnson*, 82 Am. Dec. 254.

RIGHT OF CONTRIBUTION FROM SUBSEQUENT GRANTEE cannot be settled in suit to redeem the premises, unless such grantee is made a party to the bill: *Lamb v. Montague*, 112 Mass. 354, citing the principal case.

THE PRINCIPAL CASE IS CITED in *Iglehart v. Crane*, 42 Ill. 268, to the point that one who is neither a "creditor" nor a "subsequent purchaser" falls neither within the letter nor spirit of the recording laws.

BLISS v. WHITNEY.

[9 ALLEN, 114.]

PLATFORM SCALES ARE FIXTURE WHEN SET INTO SOIL and firmly attached to a building, so that to remove them would leave an excavation under and in front of the building, and deface the room to which the weighing apparatus was fastened; and if they are put there by a tenant, they must be removed by him before the expiration of his term, or they will pass to the owner of the realty.

TORT for the conversion of a set of platform scales. On the trial the judge ruled that the scales did not constitute a fixture, and did not pass by the deed from Lane to the defendant. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The other facts are stated in the opinion.

P. E. Aldrich and P. C. Bacon, for the defendant.

F. H. Dewey, for the plaintiff.

By Court, GRAY, J. Fixtures annexed to real estate become part of it. If annexed by the owner of land, they pass with it

by a sale or mortgage from him, or by a levy of execution for his debt; and if he dies intestate seised of the land and fixtures, they go the heir as against the executor. If annexed by a tenant for purposes of trade, or some other immediate or temporary uses, or for ornament, he may, indeed, while remaining in possession, sever them from the land, and thus change their character back again from realty to personalty; but if, without having done so, he voluntarily quits the premises at the expiration of his term without any special agreement with his landlord, neither he nor his vendee can afterwards claim them against the owner of the land: *Goddard v. Chase*, 7 Mass. 432; *Gaffield v. Hapgood*, 17 Pick. 192 [28 Am. Dec. 290]; *Noble v. Bosworth*, 19 Id. 314; *Winslow v. Merchants' Ins. Co.*, 4 Met. 310, 311 [38 Am. Dec. 368]; *Shepard v. Spaulding*, 4 Id. 416; *Buller v. Page*, 7 Id. 40 [39 Am. Dec. 757]; *Wall v. Hinds*, 4 Gray, 256 [64 Am. Dec. 64].

The platform scales, to recover the value of which this action is brought, are shown by the bill of exceptions to have been set into the soil and firmly attached to the building. The earth had been displaced, and a wall built around the excavation, to receive the platform. To remove the platform and scales would leave this excavation under and in front of the building, and deface the room to which the weighing apparatus was fastened. They were as much a part of the freehold as a furnace or fire-frame or dyer's kettles fixed in brick-work, in the cases above cited.

It does not appear by the bill of exceptions whether Holmes and Hubbard, the plaintiff's vendors, were the owners or the tenants of the building, nor by whom the scales were put in. But assuming (as most favorable to the plaintiff) that Holmes and Hubbard were tenants only, and had themselves put in the scales, the utmost right which they could exercise or transfer, without their landlord's assent, was to remove the scales during their occupation, and thus make them personal property. This not having been done, nor any deed of them executed in the form necessary to pass real estate before the land became the property of Lane, the fixtures passed with the land to Lane, and his subsequent conveyance to the defendant gave him a perfect title to the scales as against the plaintiff.

Exceptions sustained.

FIXTURES, WHAT CONSTITUTE: See *Symonds v. Harris*, 81 Am. Dec. 553, note 556, where other cases are collected; *Sweetser v. Jones*, 82 Id. 639. A

building annexed to the realty is a fixture: *Talbot v. Whipple*, 14 Allen, 181, citing the principal case. A set of platform scales is a part of the realty: *Arnold v. Crowder*, 81 Ill. 60, citing the principal case. A tenant may remove trade fixtures during his term, but not afterwards: *Bainway v. Cobb*, 99 Mass. 459; *Watris v. National Bank of Cambridge*, 124 Id. 575; *Ex parte Ames*, 1 Low. 566, all citing the principal case. A bowling alley is within the list of "trade fixtures": *Whelan v. Sullivan*, 102 Mass. 204, citing the principal case. Fixtures, so long as they are annexed, are a part of the realty, and an action in the nature of trover does not lie to recover them: *Guthrie v. Jones*, 106 Id. 196, citing the principal case.

BESSE v. DYER.

[9 ALLEN, 151.]

OFFER OF REWARD BY PUBLIC ADVERTISEMENT is to be regarded as a conditional promise. Whoever would entitle himself to the reward must prove that he has performed substantially the service proposed in the advertisement, though it need not be performed literally.

ONE WHO GIVES TO OWNERS OF STOLEN PROPERTY, WHO HAVE OFFERED REWARD for its recovery and the detection of the thief, information by which, with reasonable diligence on their part, they are enabled to recover the property and detect the thief, is entitled to the reward, although he does nothing further to aid in the recovery of the property and the conviction of the thief.

CONTRACT brought to recover the amount of a reward offered by the defendants by a handbill describing the property which had been stolen from them, and stating that "the above reward will be paid for the detection of the thieves and the recovery of the property." On the afternoon of the day on which the reward was offered, the plaintiff saw at a railroad station a box which, as he suspected, contained the stolen property, and thereupon he went and informed one of the defendants of his suspicions, and his reasons therefor, stating at the same time that he should expect the reward. He then went home, and did nothing further to aid in the recovery of the property or detection of the thief, and was not requested to do anything further. The other facts are stated in the opinion.

W. Colburn, for the plaintiff.

E. Ames, for the defendants.

By Court, CHAPMAN, J. An offer of a reward by a public advertisement is to be regarded as a conditional promise. The advertiser states such terms as he pleases, and whoever would entitle himself to the reward must prove that he has

performed substantially the service proposed in the advertisement, though it need not be performed literally. In *Fallick v. Barber*, 1 Maule & S. 108, a person had advertised the loss of a child, and offered that whoever would give information where the child was, so that it might be restored to its friends, should have a certain reward. The defendant had given the information and obtained the reward. The plaintiff had first given the information to the defendant, but it was held that he had not performed the service proposed, and was not entitled to maintain an action against the defendant to recover from him any part of the money. In *Lancaster v. Walsh*, 4 Mees. & W. 16, a person who had been robbed of certain notes advertised that "whosoever would give information whereby the stolen property could be traced should, upon the conviction of the parties, receive a certain reward"; and it was held that the person who first gave information to the advertiser which led to the result stated, was entitled to the reward. In *City Bank v. Bangs*, 2 Edw. Ch. 95, a reward was offered for the recovery of stolen money. The person who gave information to the police-officers, and pointed out the trunk which contained the money, and in which they found it, was held to be entitled to the reward. In *Crawshaw v. Roxbury*, 7 Gray, 374, the reward was offered for the apprehension and conviction of the guilty person. The plaintiff had pointed out the person to the police-officers, stated circumstances tending to prove his guilt, and requested them to arrest him. He was accordingly arrested, and was convicted without further aid from the plaintiff. But it was held that the plaintiff had done enough to be entitled to the reward, and that the offer was not to be construed literally.

In the present case, the defendants had lost property by theft, and offered a reward for the detection of the thieves and the recovery of the property. The plaintiff, having discovered what he believed to be the stolen property, gave the defendants information where it was, and by means of this information the defendants obtained it; and by keeping watch till it was inquired after, they detected and convicted the thief. All that the plaintiff did was to give them the information which enabled them by reasonable efforts to do this.

But the court are of opinion that the giving of this information to the defendants was, under the circumstances of the case, a substantial performance of the service proposed. When the plaintiff made the communication to one of the defendants,

he told him he expected the reward; and that defendant did not inform him that any further service was expected of him or would be necessary. It is plain that the plaintiff could not have identified the property nor proved the theft without the aid of the defendants, and therefore a literal compliance with the terms of the advertisement was impossible. It was necessary that the defendants should do something themselves; and as they did not suggest to the plaintiff, when he performed the service and claimed the reward, that his further services would be necessary, they ought not to make the objection now.

Judgment on the verdict.

ADVERTISEMENT OFFERING REWARD IS CONTRACT: See *Ryer v. Stockwell*, 73 Am. Dec. 634, note 638, where this subject is discussed. A substantial performance of the service proposed in the advertisement must be shown to enable the party claiming the reward to recover: *Burke v. Wells, Fargo, & Co.*, 50 Cal. 221, citing the principal case. But it is not necessary that an informer, in order to entitle him to a reward, should act as a prosecutor or be called as a witness. It is enough that the result is in fact reached primarily through his instrumentality: *United States v. One Hundred Barrels of Distilled Spirits*, 1 Low. 248, also citing the principal case.

GILMORE v. NEWTON.

[9 ALLEN, 171.]

BUYING HORSE FROM ONE WHO HAD NO RIGHT TO SELL HIM, and subsequently exercising dominion over him by letting him to another person, amount to a conversion, although the buyer believed his title to the horse to be perfect; and no demand by the owner is necessary before commencing an action for the conversion.

TORT for the conversion of a horse. The evidence on the trial tended to show that the plaintiff, who was the owner of the horse, let him to one Barrows, who exchanged him with the defendant for another horse, and that the defendant afterwards let him to a person who ran away with him. The defendant supposed his title to the horse to be perfect; and no demand was made by the plaintiff before commencing this action. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions.

W. Colburn, for the defendant.

F. D. Ely, for the plaintiff.

By Court, METCALF, J. We cannot sustain these exceptions. The authorities are decisive that the defendant converted to

his own use the plaintiff's horse by taking an assignment and possession of him from a person who had no authority to dispose of him, and subsequently exercising dominion over him: *Stanley v. Gaylord*, 1 Cush. 546 [48 Am. Dec. 643], and cases there cited; *Riley v. Boston Water Power Co.*, 11 Id. 11; *Williams v. Merle*, 11 Wend. 80 [25 Am. Dec. 604]; *Riford v. Montgomery*, 7 Vt. 418; *Courtis v. Cane*, 32 Id. 232 [76 Am. Dec. 174]. In *McCombie v. Davies*, 6 East, 540, Lord Ellenborough said: "According to Lord Holt, in *Baldwin v. Cole*, 6 Mod. 212, the very assuming to one's self the property and right of disposing of another man's goods is a conversion; and certainly a man is guilty of a conversion who takes my property by assignment from another, who has no authority to dispose of it." The defendant admits that, although he had no notice that the horse was stolen, yet he acquired no title to him. But he objects to the maintenance of this action, because no demand of a delivery of the horse to the plaintiff was made and refused before the action was commenced. And he cites, among other books, 2 Greenl. Ev., sec. 642, where it is said that "a mere purchase of goods, in good faith, from one who had no right to sell them, is not a conversion of them against the lawful owner until his title has been made known and resisted." This position, though not supported by the cases referred to by Mr. Greenleaf, may be sustained by other cases. And not only are there decisions that "a mere purchase" of property, without taking possession of it, is not a conversion of it, but also decisions that a purchase, receiving a pledge, or other bailment, etc., of property from one who had no right to dispose of it, and taking possession thereof, without any further act of dominion over it, does not always constitute a conversion of it. But we need not discuss this class of cases, for no one of them sustains the defendant's objection; for his is a case, not only of receiving an assignment and taking possession of the horse, but also of afterwards exercising dominion over him by bailing him to a third person: See *Leonard v. Tidd*, 3 Met. 6; *Fernald v. Chase*, 37 Me. 292; *Billiter v. Young*, 6 El. & B. 41.

Demand and refusal are never necessary as evidence of conversion, except when the other acts of the defendant are not sufficient to prove it; nor are they evidence of it when, as in this case, it was not in the power of the defendant to deliver the property when demanded. Besides, after property has been converted, a delivery of it to the owner, on demand by

him, will not bar or defeat an action for the conversion, but will only mitigate damages. A demand on the defendant for the horse was therefore needless for the plaintiff, and would have been useless to the defendant.

Exceptions overruled.

WHEN THIEF SELLS PROPERTY, EVEN TO HONEST PURCHASER, no title passes, and the true owner may maintain an action for the property without a previous demand: *Heckle v. Surrey*, 101 Mass. 345; *Carter v. Kingman*, 103 Id. 519; *Bearce v. Bowker*, 115 Id. 132; *Moody v. Blake*, 117 Id. 280, all citing the principal case. Possession of property acquired by a person purchasing from a bailee who has no authority to sell is tortious, and the owner may maintain replevin therefor without demand or notice: *Gabin v. Bacon*, 25 Am. Dec. 258, note 260, where other cases are collected; *Pierce v. Benjamin*, 25 Id. 396, note 400. The purchaser of a horse, who exercises acts of ownership by letting him to another, is liable to the rightful owner in trover without a previous demand: *Spooner v. Holmes*, 102 Mass. 507, citing the principal case.

AUCTIONEER SELLING STOLEN PROPERTY, WHETHER LIABLE IN TROVER. See *Rogers v. Huie*, 56 Am. Dec. 363, note 366.

TROVER LIES TO RECOVER PROPERTY TAKEN BY THEFT: See *Hutchinson v. M. & M. Bank*, 80 Am. Dec. 596; *Sinclair v. Jackson*, 74 Id. 476.

DEMAND NEED NOT BE PROVEN IN TROVER where there has been an actual conversion: *Webber v. Davis*, 69 Am. Dec. 87, note 90, where other cases are collected; *Cunningham v. Baker*, 84 Ind. 601, citing the principal case. But where there is no evidence of any conversion in fact, trover cannot be maintained; *Pitlock v. Wells, Fargo, & Co.*, 109 Mass. 457; *Metcalf v. McLaughlin*, 122 Id. 87, both citing the principal case.

HARRISON v. CITY FIRE INSURANCE COMPANY.

[9 ALLEN, 281.]

POLICY OF INSURANCE ON DWELLING-HOUSE OCCUPIED BY TENANT containing a stipulation that "the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company and additional premium paid," will become void if the building is vacated and no notice is given except to an agent of the company whose authority is limited to the receiving and forwarding applications for insurance to the company, to the collection of premiums, and to binding the company on special hazards for the term of ten days, and no additional premium is paid; and it is immaterial, in such case, that the insured did not know the limited extent of the agent's authority.

CONTRACT upon a policy of insurance, issued by the defendants upon the plaintiff's dwelling-house. The jury returned a verdict for the defendants, and the plaintiff alleged exceptions. The other facts appear from the opinion.

T. Weston, Jr., for the plaintiff.

L. T. Willcox, for the defendants.

By Court, BIGELOW, C. J. The premises covered by the policy declared on were insured as occupied premises, and it was expressly stipulated in the body of the policy that, in all cases in which premises are so insured, "the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company and additional premium paid." Under this clause, it is clear that the contract of insurance had terminated several weeks prior to the occurrence of the loss by fire. The notice to the agent that the plaintiff's tenants had left the premises, and that the premises were vacant, did not fulfill the stipulation in the policy. The agent had no power or authority to receive such notice in behalf of the company. He was a special agent only, with strictly limited power. He could not issue a valid policy or enter into contracts generally in behalf of the defendants. He was authorized only to receive and forward applications for insurance to the company, to collect premiums, and to bind the company on special hazards for the term of ten days. Beyond this his authority as agent did not extend. He could not receive any notice which would affect the rights of this company under a policy already issued, nor had he any authority to fix an additional premium in consideration of a change in an existing risk, which, by the terms of the policy, the parties had agreed should be deemed an increase of the hazard which the company originally assumed.

It is no answer to say that the plaintiff had no knowledge of the limited extent of the agent's authority. This he was bound to ascertain before dealing with him as agent. No rule of law is more familiar or better settled than that which requires a person who transacts business with a special agent to take notice of the nature and scope of the agent's power. He is put on inquiry by the very fact that he is negotiating with an agent, and is bound to ascertain whether he can bind his principal in the transaction which he purports to carry on in his behalf. If it were not so, there would be no distinction between a special and a general agent, and all restrictions and limitations on an agent's authority would be nugatory. A principal would in all cases be at the mercy of his agent, however carefully and strictly he might have restricted his authority: *Lobdell v. Baker*, 1 Met. 201 [38 Am. Dec. 858]; *Snow v. Perry*, 9 Pick. 542; Story on Agency, sec. 133.

The statute of 1861, chapter 170, relating to agents of insurance companies, has no application to a case like the present. That enactment was not designed to change in any way the rules of the common law regulating the power of agents or their authority to bind their principals, but only to declare that certain classes of persons should be deemed to be so far agents of insurance companies as to be liable to the penalty prescribed by General Statutes, c. 58, sec. 77.

Exceptions overruled.

ALTERATIONS IN INSURED PREMISES, EFFECT OF ON POLICY: See *Cahert v. Hamilton M. I. Co.*, 79 Am. Dec. 744, note 746, where other cases are collected. Where a policy contains a provision that if the assured shall vacate the premises the policy shall be void, no action can be maintained on the policy if the premises are vacated before the occurrence of a loss: *Franklin S. I. v. Central M. F. I. Co.*, 119 Mass. 240; *McClure v. Watertown F. I. Co.*, 40 Pa. St. 281, both citing the principal case.

AGENT OF INSURANCE COMPANY HAVING AUTHORITY ONLY TO RECEIVE APPLICATIONS, take risks, settle rates of premium, and issue policies, is not, in the absence of evidence, to be regarded as having authority to waive the preliminary proof of loss required by the policy: *Lohmes v. Insurance Co. of N. A.*, 121 Mass. 442, citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Markey v. Mutual B. I. Co.*, 103 Mass. 93; and in *Wood v. Firemen's Ins. Co.*, 128 Id. 319, to the point that the statute of 1861, c. 170, did not affect the power of insurance agents to bind their principals, or change in any respect the rules of the common law upon the subject of agency.

THAYER v. WELLINGTON.

[9 ALLEN, 283.]

WILL DULY ATTESTED, GIVING SUM OF MONEY TO TRUSTEES TO APPROPRIATE SAME in such manner as the testator may by any instrument in writing under his hand direct and appoint, and an appointment by a separate instrument in writing signed by the testator, but not attested as required by the statute of wills, declaring the appropriation and naming the beneficiary, do not operate to create a valid bequest in favor of the beneficiary, and cannot be enforced as such. And where no charity is declared or indicated in the will, the fact that the legacy is appropriated by the unattested instrument to a public charity does not give to it any greater legal effect.

DEVISES OF REAL ESTATE AND LEGACIES OF PERSONAL ESTATE HAVE BEEN PLACED UPON SUBSTANTIALLY SAME FOOTING in Massachusetts, as to the extent of the power to devise and the formalities required in the execution of a testamentary instrument. And both a lapsed devise of real estate and a lapsed legacy of personal estate will pass under a general residuary clause in the will, unless a clear intention to the contrary is shown by the will.

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BILL of revivor by the administrator *de bonis non* with the will annexed of the estate of Edmund T. Dana, to revive a bill in equity praying for the instructions of this court as to the proper discharge of the administrator's duty under one clause of said will. Edmund T. Hastings was appointed executor, and all the rest and remainder of the estate, real and personal, were devised to him in trust, to be paid ultimately to the children of Francis Dana. The parties defendant were William W. Wellington, the city of Cambridge, and the children of Francis Dana. Evidence was introduced to show that the Cambridge Athenæum was a public charity. The other facts are stated in the opinion.

B. R. Curtis and C. T. Russell, for the city of Cambridge.

A. H. Fiske and H. G. Parker, for the residuary devisees.

By Court, DEWEY, J. The present bill is filed by the administrator with the will annexed of the estate of the late Edmund T. Dana, who asks the direction of this court as to his duty in the execution of his trust as to the payment of any money in discharge of a certain provision in the twenty-third clause of the will, which is in the words following: "I give to the said Edmund T. Hastings and to William W. Wellington, and to the survivor of them, fifteen thousand dollars, in trust, to appropriate the same in such manner as I may, by any instrument in writing under my hand, direct and appoint." The testator, by a separate instrument, bearing on its face the same date as the will, but not attested by any witness, or shown to have been executed in the presence of any, or to have been signed on the same day, except so far as the date written thereon would lead to that inference, did direct and appoint as follows: "To Edmund T. Hastings and William W. Wellington, or whosoever else may execute the trust created by the twenty-third clause of my will. The sum of fifteen thousand dollars bequeathed by the said twenty-third clause is to be paid over, if and whenever my trustees or trustee shall deem it expedient to do so, to the city of Cambridge, to be held by the said city in trust as an entire fund, the income thereof to be appropriated annually forever to the increase and support of the library of the Cambridge Athenæum; provided, however, that if and whenever my said trustees or trustee shall be of opinion that it is not expedient that the said sum of fifteen thousand dollars should be so appropriated, the same to be paid over to my heirs at law; and pro-

vided, further, that the said capital sum be paid over, either to said city of Cambridge or to my heirs at law, within three years from my decease."

This paper, it is alleged, was placed by said Dana in the hands of said Edmund T. Hastings, but at what time does not appear. Hastings and Wellington, on the 16th of May, 1861, signified in writing their intention of paying the said sum of money to the city of Cambridge, whenever it should be paid to them by the executor of the will.

Upon these facts it is contended, on the part of the residuary devisees, that by the twenty-third clause of the will nothing passed to the city of Cambridge, it not being named as a legatee, and that it was not competent for the testator by a duly executed will to create or reserve to himself a power to declare testamentary bequests by another instrument to be signed by himself, but not attested by witnesses, as required by the statute regulating wills.

The power of transmitting property by will is a power to be exercised solely under our statute law. The legislative authority has seen fit to regulate the exercise of this power by precise and clear provisions. By those provisions, as found in the Revised Statutes, c. 62, sec. 6, and General Statutes, c. 92, sec. 6, it is declared that "no will [with certain exceptions, which are now immaterial] shall be effectual to pass any estate, whether real or personal, nor to charge or in any way affect the same, unless it be in writing and signed by the testator, or by some person in his presence and by his express direction, and attested and subscribed in the presence of the testator by three or more competent witnesses." These provisions are express in their terms, and prescribe a rule from which this court cannot depart, although its application in particular cases may defeat the actual intention of a person as to the disposition of his property. The practical benefits of such provisions have been fully acknowledged by the long continuance of statutes requiring them as to devises of real estate, and the general extension of them at a later period to wills of personal property.

A similar view of this subject prevails in England, where the statute of 1 Vict., c. 26, seems to be designed and effectually framed to make the provision requiring a certain number of witnesses to a will to be in effect one that should actually embrace all cases of bequests claimed under a will, and exclude all reservation of power on the part of the testa-

tor to extend the provisions of a will by an instrument not executed as required by the statute of wills.

It is true that the provisions of that statute are somewhat broader than those of our own statute, and it is by the latter that the present case is to be adjudicated. But we think that under a similar statute to that which has existed here since the enactment of the Revised Statutes in 1856, requiring an attestation by three witnesses of the execution of wills of real or personal estate, the English courts would not have sustained a provision in a will, that the particular beneficiary should be declared by the testator in a subsequent and independent instrument, not executed in the form prescribed by such statute. While the law permitted legacies of personal property to be given without any attestation of witnesses and by loose and informal papers, the courts were disposed to give effect to a bequest of personal property by an instrument not duly attested as a will, notwithstanding the existence of a will previously made and executed in conformity to the statute. But under our statute requiring attestation by three witnesses in cases of personal bequests as well as of devises of real estate, no instance has occurred in which we have sanctioned any departure from the requirement that all bequests must be made by a will duly attested.

The statute of 1 Vict., c. 26, has put an end in England to all attempts by testators to create by an attested will a power to charge by a separate instrument, not duly attested, legacies upon their estates: 1 Jarman on Wills, 4th Am. ed., 131. As already remarked, it will be found that, prior to that statute, it had been held that where, by a will duly attested, the testator had charged his land with the payment of debts and legacies, that is, where a devise of land was made subject to the payment of legacies, a personal bequest given by an instrument not duly attested according to the statute was a valid legacy, and chargeable upon the estate. In this state of the law, it was urged that it would follow from this course of decisions that a person might, by means of a will duly executed, secure to himself the power to make a further disposition of his lands by a written instrument, not duly attested as a will, declaring the devisees. To this it was answered that if a man might, by a will duly attested, devise his land upon such trust as he should appoint by any other instrument, it would, in effect, amount to a repeal of the statute in respect to the solemnities of testamentary dispositions of land. A man

would have nothing to do on his coming of age but to devise his whole real estate to some nominal person, upon such trust as the testator should, in writing, thereafter appoint, and thus he might at any time thereafter make a testamentary disposition of his estate without conforming to the ceremonies required by the statute: *Fearne's Cas. & Op.* 435; 6 *Cru. Dig.*, Greenl. ed., tit. 38, c. 5, secs. 59, 60. The view thus stated, denying that any authority could be reserved by the testator to declare and create new devisees by an unattested instrument, when the devise was one within the statute, was sustained in *Habergham v. Vincent*, 5 *Term Rep.* 92; *S. C.*, 2 *Ves. Jr.* 204; *Rose v. Cunynghame*, 12 *Id.* 29; and *Johnson v. Ball*, 5 *De G. & S.* 85.

In 2 *Washburn on Real Property*, 696, the rule upon this subject is stated to be, that a testator cannot by his will reserve a power to dispose of an estate at a future time, by an instrument not executed as required by the statute, so that it may take effect under his will. The doctrine of the New York courts is to the like effect. In *Langdon v. Astor*, 3 *Duer*, 477, it was said by *Duer, J.*, "that a testator cannot by will create for himself prospectively a power to revoke any disposition of property in his will, by an instrument not properly attested." The ruling of the court of appeals in the same case was equally strong: 16 *N. Y.* 9. In *Thompson v. Quimby*, 2 *Bradf.* 449, it was held that a will cannot reserve a power to give, by an instrument not executed as a will.

We find no authority in any decision of this court for sustaining a bequest made under such reserved power of future declaration by the testator as to the nature of the legacy and the person for whose benefit it is given, and we cannot but feel that holding a devise or bequest thus created to be legal would be in direct contradiction both of the letter of the statute and of the purposes intended to be secured by its enactment. Unless we refuse to sanction a bequest of this character, the statute becomes a dead letter as to all who choose to disregard it. It would only be necessary to make a mere naked devise, duly attested by three witnesses, to some individual, to hold the same wholly in trust for such persons as the testator should thereafter direct and appoint, and then, by an instrument not executed in the presence of witnesses, the testator might create his legatees as his caprice might suggest. The language of this court in *Tucker v. Seaman's Aid Society*, 7 *Met.* 204, was, "that the law requires a will to be executed

in the presence of three witnesses, and with other solemnities calculated to insure correctness and guard against mistake and imposition; and without this precaution every act and instrument purporting to give property, real or personal, by will, is inoperative and void."

We are restrained by the statute, and by the course of judicial decisions upon statutes of like character, from giving effect to a legacy declared and given to a legatee by an instrument not duly attested as a testamentary disposition of property. The result is, therefore, that the instrument signed by Edmund T. Dana declaring that the sum of fifteen thousand dollars, bequeathed by the twenty-third clause of the will under consideration, does not operate to create a valid bequest in favor of the city of Cambridge, and cannot be enforced as such.

The view thus taken of the present case does not exclude in all cases a reference to other documents or instruments for the purpose of giving effect to a will. A testator may refer expressly to a paper already executed, and describe it with such particularity as to incorporate it virtually into the will, or he may refer to deeds and other instruments, or monuments, or existing facts, to which reference may be had in construing his will: *Habergham v. Vincent*, 2 Ves. Jr. 228; *Smart v. Pruejan*, 6 Ves. 560. The distinction is a very obvious one. In the case last cited, the purpose of the testator as to the particular legatee and the character of the legacy is fully settled. Such reference leaves nothing ambulatory, and excludes the idea of an unsettled purpose and a design to leave anything open as to the person who shall be the legatee. But if his purpose is not definitely settled at the time of executing his will, and is to be fashioned and moulded by future events which may affect his mind, such future determination to make one a legatee cannot be allowed to have any legal effect, unless by the execution of a codicil or a subsequent will in accordance with the legal requirements of a testamentary instrument.

It is further urged that, although the instrument signed by Mr. Dana directing the appropriation and naming the city of Cambridge as the beneficiary may be defective as a will or codicil, by reason of its not being duly attested, yet this court may sustain the intended legacy, it being given to a charitable use, and to be dealt with as a public charity. No doubt a court of equity will deal liberally with a public charity. It

will do so in supplying the want of a proper trustee, and in aiding the defective execution of a power of appointment, or an error in the general description of the beneficiary. But the difficulty in the present case is, that no public charity is established or shown to exist under the will of Mr. Dana. There is nothing therein to raise the slightest presumption of a public charity. The clause in the will declared a mere naked trust of a sum of money, which the testator reserved the right to appropriate in such a manner as he might subsequently direct and appoint. It would have been as competent, under this provision, to appropriate it to any one of his kindred as to the city of Cambridge. It is only by recurring to the instrument not duly attested that any allusion is found to a public charity, or that the city of Cambridge is declared to be a beneficiary. The difficulty here lies too deep to be removed even by a court of equity. It is the absence of any legal instrument creating a public charity, and not the defective execution of a power of appointment which has been legally authorized by a will.

Nor can we adopt the suggestion made in behalf of the city of Cambridge, that effect may be given to the supposed object of this charity by holding the bequest to be an absolute one by the testator of a sum of money to Hastings and Wellington personally, in the confidence that they would appropriate it as he should thereafter request. The words of the clause do not authorize such a construction to be given to it. The bequest has on its face language directly contradictory to it. The fifteen thousand dollars were given to Hastings and Wellington in trust, "to appropriate the same in such manner as I may, by any instrument in writing under my hand, direct and appoint." It was not the intention of the testator, under this clause in the will, to make any present appropriation of the sum named therein, or to clothe the trustees with power so to do.

In the opinion of the court, the twenty-third clause of this will, with the unattested instrument signed by Mr. Dana, declaring the appropriation of the sum of fifteen thousand dollars to the city of Cambridge, and the assent of said Hastings and Wellington to the payment of the same, do not create a valid bequest to the city of Cambridge.

If any question exists between the residuary devisees and the heirs at law as to the right to this sum, that question is not properly before us, for want of proper parties.

After the foregoing decision was rendered, the plaintiff, by leave of the court, filed his amended bill making the heirs at law parties. Francis Dana, one of said heirs, appeared, and submitted his rights to the determination of the court. Mary E. Dana, another of said heirs, appeared, and claimed her share of the fifteen thousand dollars. The other heirs at law appeared and filed an answer, setting forth that if the court should decree that the sum in controversy must be paid to the heirs at law, they should hold the same in trust for the city of Cambridge, as nearly as might be in the manner indicated by the will and memorandum of the testator.

A. H. Fiske and H. G. Parker, for the residuary devisees.

G. S. Hale, for Mary E. Dana.

J. Willard, Jr., for Francis Dana.

DEWEY, J., delivered the opinion of the court, of which the following is a synopsis: The court is now called upon to decide whether the fifteen thousand dollars named in the 23d clause of the will is to pass to the heirs at law as undivided estate or to the persons named in the residuary clause. It is a universally acknowledged rule of law that in a will of personal estate a general residuary bequest carries to the residuary legatee all void legacies, all lapsed legacies, all that is not disposed of to others: *Hayden v. Stoughton*, 5 Pick. 537; *James v. James*, 4 Paige, 115; *Greene v. Dennis*, 6 Conn. 293 [16 Am. Dec. 58]; *Cambridge v. Rous*, 8 Ves. 12; *Rennell v. Abbott*, 4 Id. 802; *McLeod v. Drummond*, 17 Id. 167.

The doctrine of the English courts and the American courts generally has been that a different rule was to apply in case of devises of real estate. But in Massachusetts all ground for any such distinction has long since been taken away. Since the enactment of the Revised Statutes, c. 62, sec. 3, devises of real estate and legacies of personal estate are placed substantially upon the same footing as to the extent of the power to devise, and the formalities required in the execution of a testamentary instrument. In distinction from the law of earlier times, the Revised Statutes, c. 62, sec. 6, require that wills of personal as well as real estate shall be executed in the presence of three witnesses. No less safeguards against undue influence or fraud are thrown around testaments of personal estate than of real estate, and the rights of the heir as to each are equally protected. The effect of this change is fully stated in *Prescott v. Prescott*, 7 Met. 141; and the case of *Blaney v. Blaney*, 1 Cush. 107, affirms the principle that such change has been made.

The rule is, that a general residuary clause passes all the estate of the testator not otherwise disposed of, unless it is manifestly contradictory to the declared purpose of the testator as found in other parts of the will. In the present case, there is no intention expressed by the testator to dispose of a part of his estate by a future codicil. The facts show nothing more than a case where the testator has failed to use proper words to give effect to his purpose to give a legacy. In all the cases of lapsed or void legacies, which are uniformly held to pass to the residuary devisee, the testator had no purpose in his mind at the time of executing his will to pass such an estate to the residuary devisee. "It is not necessary that the testator's mind should be active in including it": *Goodright v. Marquis of Downshire*, 2 Bos. & P. 600. The contrary intention of the testator, spoken of in the books as that which will prevent such legacy going to the residuary devisee, is something more than the fact that the testator supposed that he had made a valid legacy to

some one of a portion of his estate, but which the court held void and inoperative. In this will the residuary clause is expressed in the broadest terms, — "all the rest and remainder of my estate and property, real and personal." In *Brigham v. Shattuck*, 10 Pick. 309, Shaw, C. J., said: "It is not necessary, in order to give effect to such a clause, that the testator should have foreseen precisely how his will would operate, or what property, in the contingencies which might happen, would pass by it." And in *Hayden v. Stoughton*, 5 Id. 539, Putnam, J., said: "The law allows the residuary legatee to take whatever shall eventually turn out not to be disposed of, whether it arise from accident or design." It was held in *James v. James*, 4 Paige, 115, that in a will of personal estate, not only what is not disposed of to others, but also what is not legally disposed of so as to pass to the person intended, passes by a residuary clause. In case of failure of a designed legacy, "no matter how, the devisee shall have the benefit of it": *Kennell v. Abbott*, 4 Ves. 803.

These general principles are with us equally applicable to a legacy of personal property and a devise. There is nothing in the present case to indicate any purpose that this residuary devisee should not take all that had not been legally disposed of to others. The result is, that the heirs at law take nothing by the failure of the twenty-third clause of the will to create a valid bequest to the city of Cambridge. The entire surplus remaining after paying all the legacies given by the will will be held for the benefit of the residuary devisees.

ATTEMPTS TO CONTROL OR SUPPLEMENT WILLS BY OTHER PAPERS. — All the modern authorities agree that a testator cannot in his will reserve to himself the power to dispose of his property at a future time by any instrument not duly executed and attested as required by the statute of wills. Nor can he alter his will otherwise than by an instrument attested in the same manner as is required by law to give effect to the will: *Habergham v. Vincent*, 2 Ves. Jr. 204; *Rose v. Cunningham*, 12 Id. 29; *Johnson v. Ball*, 5 De Gex & S. 85; *Wilkinson v. Adam*, 1 Ves. & B. 422; *Ferraris v. Hertford*, 3 Curt. Ecc. 468; *Croker v. Hertford*, 4 Moore P. C. C. 339; *Allen v. Maddock*, 11 Id. 427; *Hollingshead v. Sturgis*, 21 La. Ann. 450; *Saylor v. Plaine*, 31 Md. 158; *Wells v. Hawes*, 122 Mass. 99, citing the principal case; *Thompson v. Quimby*, 2 Bradf. 449; *Langdon v. Astor's Executors*, 16 N. Y. 9; *Johnson v. Clarkson*, 3 Rich. Eq. 305; *Power v. Davis*, 3 McAr. 153; 1 Jarman on Wills, 131; 1 Redfield on Wills, 278; Schouler on Wills, sec. 231. The last-named writer, in discussing this subject, says: "As to a paper not actually in existence, but hereafter to be prepared and executed, no reference in the existing will can give it any valid testamentary effect, independently of its own proper execution as a will in conformity with the statute. Hence, the testator cannot reserve a power to dispose of property at a future time by what is tantamount to a will informally executed." In *Allen v. Maddock*, 11 Moore P. C. C. 427, it was held that since the enactment of the statute 1 Vict., c. 26, no paper not properly executed and attested can, in strictness, be for any purpose a will or codicil. In the case of *Ferraris v. Hertford*, 3 Curt. Ecc. 468, a testator, by a will duly executed, directed his executors to pay legacies which he should give by any testamentary writings signed by him, whether witnessed or not. But the court decided that this clause could not give effect to legacies bequeathed by an unattested paper made subsequently to the statute 1 Vict., c. 26. In *Wells v. Hawes*, 122 Mass. 99, Roxana Phelps devised to Elisha B. Bridgman the residue of her estate, adding these words: "Having full confidence that he will so use and dispose of it as to carry out my wishes in regard to the distribution of my personal estate, as expressed in a

memorandum which I shall leave in his possession." Lord, J., who delivered the opinion of the court, said: "Under the will of Roxana Phelps, Bridgman took the demanded premises subject to no trust by reason of any written memorandum left by the testatrix," citing the principal case. In *Hollingshead v. Sturgis*, 21 La. Ann. 450, it was decided that a letter written by the testator posterior to the date of his last will, not clothed with the formalities required for a testament, will not operate a revocation of the last will; that the act by which a testamentary disposition is revoked must be made in one of the forms prescribed for testaments, and be clothed with the same formalities. In the case of *Will of Ladd*, 60 Wis. 187, S. C., 50 Am. Rep. 355, a will was wholly written on the first page of a double sheet of paper. On the fourth page the testatrix wrote in pencil, "I revoke this will," and signed and dated it, but it was not attested. This was decided not to operate a revocation of the will under the Wisconsin statute. And in *Power v. Davis*, 3 McAr. 153, it was decided that a codicil signed by the testator, but not attested by witnesses as required by the statute, cannot alter a previously executed and attested will. But one who has made a last will may by a subsequent will appoint an executor, and although the will last written contains no other provision than the appointment of an executor, the objection that it is not dispositive is untenable: *Miller v. Miller*, 32 La. Ann. 437.

PAPER INCORPORATED INTO WILL BY REFERENCE. — If a will, duly executed and witnessed according to the requirements of the statute, incorporates into itself by reference any document or paper not so executed and witnessed, whether such paper referred to be in the form of a will or codicil, or of a deed or indenture, or of a mere list or memorandum, the paper so referred to, if it was in existence at the time of the execution of the will, and is identified by clear and satisfactory proof as the paper referred to therein, will take effect as part of the will, and be admitted to probate as such: *Singleton v. Tomlinson*, L. R. 3 App. Cas. 404; *Goods of Durham*, 3 Curt. Eccl. 67; *Goods of Dickens*, 3 Id. 60; *Goods of Willesford*, 3 Id. 77; *Goods of Bacon*, 3 Notes of Cas. 644; *Goods of Smartt*, 4 Id. 38; *Quihampton v. Going*, 24 Week. Rep. 917; *Habergham v. Vincent*, 2 Ves. 204; *Fesler v. Simpson*, 58 Ind. 83; *Pickle v. Snapp*, 97 Id. 289; S. C., 49 Am. Rep. 449; *Newton v. Seaman's Friend Society*, 130 Mass. 91; S. C., 39 Am. Rep. 433; *Jackson v. Babcock*, 12 Johns. 389; *Tonelle v. Hall*, 4 N. Y. 140; *Webb v. Day*, 2 Demarest, 459; *Chambers v. McDaniel*, 6 Ired. 226; *Gerrish v. Gerrish*, 7 Or. 351; S. C., 34 Am. Rep. 585; *Hauberger v. Root*, 6 Watts & S. 431; *Baker's Appeal*, 107 Pa. St. 381; S. C., 52 Am. Rep. 478; *Johnson v. Clarkson*, 3 Rich. Eq. 305; *Pollock v. Glassell*, 2 Gratt. 439; 1 Redfield on Wills, 278; Schouler on Wills, sec. 281. And the same is true of a duly executed and attested codicil which refers to a prior unattested will, or to any other instrument already in existence: *Allen v. Maddock*, 11 Moore P. O. C. 427; *Doe ex dem. Williams v. Evans*, 1 Cromp. & M. 42; *Beall v. Cunningham*, 3 B. Mon. 390; S. C., 39 Am. Dec. 469; *Harvey v. Chouteau*, 14 Mo. 587; S. C., 55 Am. Dec. 120, note 126; *Brown v. Clark*, 77 N. Y. 369. But a codicil not executed as a will, but as a codicil only, cannot be admitted to probate as a will, nor validate a former will which has been rendered invalid by the marriage of the testatrix: *Proctor v. Clarke*, 3 Redf. 445. And a codicil which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil: *Burton v. Newberry*, L. R. 1 Ch. Div. 234.

The republication of a will by the execution of a codicil will not of itself entitle an unexecuted paper, written or signed between the date of the will

and the date of the codicil to probate. But where the will, if read as speaking at the date of the execution of the codicil, contains language which would operate as an incorporation of the document to which it refers, such document, although not in existence until after the execution of the will, is entitled to probate by force of the codicil: *In the Goods of Lady Truro*, L. R. 1 Pro. & Div. 201.

A testatrix executed a will in 1848, in which she requested her trinkets to be divided "as I shall direct in a small memorandum." She executed a codicil in 1853, and another in 1862, which amounted to a re-execution of the will. After her death, the will, the two codicils, and a paper headed "memorandum of trinkets referred to in my will," were found folded together in her portfolio. There was no evidence to show that the memorandum was in existence when the will was signed, but there was evidence from which it might be inferred that it was in existence before the date of the last codicil, but the last codicil did not refer to it. It was held that the re-execution of the will by the last codicil could not make that a part of the will which was no part of it before, and that the memorandum ought not to form part of the probate: *In the Goods of Mathias*, 3 Swab. & T. 100.

Where a will refers to a paper, such paper cannot be incorporated into the will unless it is clearly identified with the description of it given in the will, and is shown to have been in existence at the time when the will was executed. Both of these facts must be fully established; and though there may be no doubt about the former, unless the latter also is proved there can be no incorporation of the paper in the will. And the onus of establishing these facts lies on the person who seeks to make the paper admissible for such a purpose. But parol evidence is admissible to establish these facts: *Habergham v. Vincent*, 2 Ves. Jr. 204; *Wilkinson v. Adam*, 1 Ves. & B. 422; *Dickinson v. Sidolph*, 11 Com. B., N. S., 341; *Croker v. Hertford*, 4 Moore P. O. C. 339; *Goods of Watkins*, L. R. 1 Pro. & D. 19; *Goods of Dallow*, 1 Id. 189; *Goods of Sunderland*, 1 Id. 198; *Goods of Gill*, 2 Id. 6; *Singleton v. Tomlinson*, L. R. 3 App. Cas. 404; *Phelps v. Robbins*, 40 Conn. 250; *Dyer v. Erving*, 2 Demarest, 160; *Webb v. Day*, 2 Id. 459; *Bailey v. Bailey*, 7 Jones, 44. All the authorities agree that, to justify the incorporation of a paper into a will by reference, the proof of its existence at the time of the execution of the will, and of its identity with that referred to in the will, must be very clear and convincing.

THE PRINCIPAL CASE IS CITED in *Oliffe v. Wells*, 130 Mass. 224, to the point that intentions not formed by a testatrix, and communicated to a trustee to whom she had devised the residue of her estate to distribute the same in such manner as should appear to him to be best calculated to carry out wishes which she had expressed to him, or might express to him, before the making of the will, could not have any effect against her next of kin. In *Nichols v. Allen*, 130 Id. 211, S. C., 39 Am. Rep. 445, it is cited to the point that when a gift or bequest is made in terms clearly manifesting an intention that it shall be taken in trust, and the trust is not sufficiently defined to be carried into effect, the donee or legatee takes the legal title only, and a trust results by implication of law to the donor and his representatives, or to the testator's residuary legatees or next of kin. It is also cited to these points in the following cases: An undisposed of remainder passes to the residuary legatee: *Mayhew v. Godfrey*, 103 Mass. 292. A residuary clause in a will includes void legacies, in the absence of a distinct intention to the contrary: *Bigelow v. Gullett*, 123 Id. 107; *Lovering v. Lovering*, 129 Id. 101. In Massachusetts, there is no distinction between a lapsed devise of real estate and a lapsed

legacy of personal estate, as to the question whether or not it passes under a general residuary clause in a will; a lapsed devise or a lapsed legacy passes under a general residuary clause, unless the will shows a clear intention to the contrary: *Holbrook v. McCleary*, 79 Ind. 171.

BASFORD v. PEARSON.

[9 ALLEN, 387.]

WHERE DEED COMPLETE IN FORM WITH EXCEPTION OF NAME OF GRANTEE IS SIGNED and sealed, the subsequent insertion of the name of a grantee, and the change of a qualified covenant into an absolute one by the parol authority of the grantor, but in his absence, will render the deed invalid as to him, and no action will lie against him upon any covenants in it; and it is immaterial that the alterations are made by a co-grantor, and that a description of the occupation of the contemplated grantee had been inserted in the deed when it was signed and sealed.

WHERE ONE PARTY TO ORAL AGREEMENT FOR EXCHANGE OF LANDS HAS EXECUTED AND DELIVERED HIS DEED, and the other has refused to fulfill his agreement, or delivered an invalid deed, an action for money had and received cannot be maintained against the latter, although the land conveyed to him was estimated at a fixed sum, and has been since sold by him and converted into money. The action should be for the price of land sold and conveyed.

CONTRACT. The opinion states the case.

I. Knowles, Jr., for the plaintiff.

A. A. Ranney, for the defendant.

By Court, CHAPMAN, J. This is an action of contract for the breach of the covenants of seisin and warranty contained in a deed alleged to have been made by both of the original defendants; and a count is added for money had and received. The husband having been discharged in insolvency, the suit has been discontinued as to him, and is now prosecuted against the wife alone. She denies that the deed declared on is her deed.

It appears that the deed was signed and sealed by her and her husband, but the name of the grantee was at that time left blank. The printed form which was used contained the usual covenants of seisin and warranty, but words were added to the latter covenant making it a limited covenant against "all persons claiming by, through, or under us [the grantors], but against none others." She gave it to her husband in this imperfect condition, and he delivered it to the plaintiff in her absence. Before the delivery, he inserted the name of the plaintiff as grantee, and erased the words which limited the

covenant of warranty, thereby making the warranty general against all persons. This was done by virtue of parol authority which he had previously received from his wife, and with the knowledge of the plaintiff; but the wife was not present, and it does not appear that she was informed that it had been done. The addition and erasure thus made constituted substantial alterations; and it has been so recently settled that such alterations cannot be made by an attorney in the absence of the grantor, without a power under seal, that the point need not be again discussed: *Burns v. Lynde*, 6 Allen, 305.

The consideration in the deed as it was when signed by Mrs. Pearson was expressed to have been paid "by —, of Boston, county of Suffolk and state aforesaid, trader"; and it is contended that this distinguishes the present case from the one referred to, because the word "trader," with the addition of his residence, indicates a particular grantee. It might, in strictness, be a sufficient answer to this suggestion to say that it indicates merely the person who paid the consideration, and that such person is not necessarily the grantee. But the better answer is, that it does not sufficiently indicate any particular grantee, and the husband might have filled it with any name he might choose to select from a very large class of persons. The fact that he was a joint grantor with his wife did not enlarge his authority in respect to the filling of blanks or the alteration of covenants. As the deed is not the deed of the wife, this action cannot be maintained against her upon any of its covenants, and the ruling on this point was right.

The plaintiff asked leave to amend his declaration by adding a count for money had and received, as the proceeds of the real estate which the plaintiff had conveyed to her, and which she had sold for cash. But the court ruled that the action could not be maintained upon the existing count, nor upon the proposed amended count. The case has been argued somewhat more broadly than this, upon the question whether the plaintiff can recover upon any amended count which he might obtain leave to file, and a proper consideration of the exact question upon which the ruling was made requires that the case should be discussed upon this broad ground. It appears that there was an oral agreement between the plaintiff and the defendant's husband, acting as her agent, that the plaintiff should convey to her, to hold to her sole and separate use, certain real estate in Chelsea, which was to be taken by

her at a fixed value in money, namely, \$750, and that, in consideration of this, the defendant and her husband were to convey to the plaintiff the real estate supposed to be referred to in the deed on which this action is brought, and which was represented to be the property of the defendant, which she held to her own sole and separate use. The plaintiff accordingly made the deed of his real estate in Chelsea, and delivered it to the defendant's husband for her. Before this action was brought she sold and conveyed this estate, and converted it into money, receiving the proceeds to her sole and separate use. The plaintiff contends that if her deed is invalid he is entitled to recover on his count for money had and received, not only because the deed is invalid, but he also offered to prove at the trial that no such land as that purporting to be conveyed by the deed ever existed.

If he had succeeded in proving the fact that there was no such land, it would have appeared that all he has ever received as a consideration for the land conveyed by him to the defendant was a deed with covenants of seisin and warranty, duly executed by her husband.

If there was no such land as the husband's deed purported to convey, the plaintiff had an immediate right of action against him, for the covenant of seisin is immediately broken when a deed purports to convey land that does not exist: *Bacon v. Lincoln*, 4 Cush. 210 [50 Am. Dec. 765]. The defendant contends that this covenant constitutes a consideration, which should have been returned or tendered or released before this action was brought. This position assumes that the covenants in the deed are the consideration for which he made his conveyance, or at least are a substantial part of it. But they are not to be so regarded. The land which was to be conveyed was the consideration; and in a case like this, where no title passes, there is a total failure of the consideration, notwithstanding the covenants in the deed. This is so in respect to both real and personal property: *Dickinson v. Hall*, 14 Pick. 217; *Rice v. Goddard*, 14 Id. 298; *Trask v. Vinson*, 20 Id. 105. In the earlier case of *Knapp v. Lee*, 8 Id. 452, the point is discussed but not fully settled.

If, then, the plaintiff has conveyed to the defendant real estate for a consideration which has totally failed, the question arises whether he has a remedy by means of this action, either in its present form, or aided by any amended count which he may have leave to file. The case of *Griswold v. Messenger*, 6

Pick. 516, has been supposed to be an authority against maintaining an action of *assumpsit* to recover the value of land sold and conveyed. But that is not the point on which that case turned. The statement of facts shows that Griswold had conveyed to Messenger certain real estate on the sole consideration that Messenger would convey it to Griswold's wife. His promise being oral was void by the statute of frauds. And the court merely decided, without giving any reasons for their opinion, that the oral evidence which was offered to prove such a promise was inadmissible. The strongest points which were made in the argument for the plaintiff, and the authorities by which they were supported, do not appear to have been considered.

On principle, a sale of land should be regarded as a good consideration for a promise, and where there is an oral promise to pay the price in money presently, the promise is not within the statute of frauds. There is no good reason, therefore, why *assumpsit* should not always have been maintained to enforce such a promise. In 2 Ch. Pl. 39, two forms of counts in *assumpsit* are given on a promise to pay money in consideration of land sold and conveyed. And it has been repeatedly held in New York that the action would lie: *Nelson v. Swan*, 18 Johns. 483; *Shephard v. Little*, 14 Id. 210; *Bowen v. Bell*, 20 Id. 338 [11 Am. Dec. 286]; *Whitbeck v. Whitbeck*, 9 Cow. 266. In this court actions of *assumpsit* have been maintained on an implied promise to pay money, the consideration of which was the conveyance of real estate: *Goodwin v. Gilbert*, 9 Mass. 510; *Felch v. Taylor*, 18 Pick. 133; *Pike v. Brown*, 7 Cush. 133; *Braman v. Douce*, 12 Id. 227. We think that upon principle and authority an action of contract will lie to enforce any oral promise to pay money presently in consideration of real estate sold and conveyed by the plaintiff to the defendant.

But when, as in the present case, and in the case of *Griswold v. Messenger*, 6 Pick. 516, the alleged oral promise is not to pay money, but to convey real estate or do some other act within the statute of frauds, if the grantor can recover, it must be upon some additional ground. In *Gray v. Hill*, Ryan & M. 420, Best, C. J., held that where the defendant, in consideration of certain repairs to be made by the plaintiff, agreed to assign a lease to the plaintiff, and after the repairs were made refused to make the assignment, and set up the statute of frauds as a defense, the law implied a promise to pay for the repairs, and this implied promise was not touched by the stat-

ute of frauds. The agreement having been executed by the plaintiff, it was held that the defendant was legally liable to remunerate him for what he had done. If the decision in *Griswold v. Messenger*, 6 Pick. 516, is right, the oral evidence ought to have been excluded in *Gray v. Hill*, Ryan & M. 420, and thus the statute of frauds would have been made a shield to fraud. But by admitting this evidence of the promise to assign the lease, not for the purpose of enforcing it, but for the purpose of showing that the consideration to be paid for the repairs had failed, and applying to the case the equitable doctrine of an implied promise, the learned judge gave the statute of frauds its full legitimate force, and prevented it from operating as a protection to fraud. In *Gillet v. Maynard*, 5 Johns. 85 [4 Am. Dec. 329], the defendant had orally agreed to convey to the plaintiff a certain tract of land, for which the plaintiff was to pay in advance by installments. After the plaintiff had paid several installments, the defendant refused to receive the balance and to convey the land, and relied upon the statute of frauds in his defense. It was held that, though he was not obliged to convey, because his promise to convey was void, yet his refusal to convey and taking advantage of the statute had the effect to rescind the contract and raise an implied promise to repay the money he had received under it. The principles that governed this decision were the same that governed that of *Gray v. Hill*, Ryan & M. 420. The same doctrines in substance have been held by this court in *Kidder v. Hunt*, 1 Pick. 328 [11 Am. Dec. 183], *Thompson v. Gould*, 20 Id. 134, and *Cook v. Doggett*, 2 Allen, 439. In the cases cited, the consideration paid by the plaintiff was either money or labor and materials. In the present case it was a conveyance of land, but that fact does not affect the principles which are to govern the defendant's promise, and her refusal to perform it. Therefore, upon a refusal of the defendant to convey to the plaintiff the land which she had orally agreed to convey to him, he might recover upon her implied promise to pay the value of the land conveyed to her, on a count for land sold and conveyed. So, if he should prove that the land which she professed to convey to him had no existence. The failure of the consideration, in case the land does not exist, does not consist in the fact that the deed was imperfectly executed, but in the fact that it would have conveyed nothing if it had been executed. It is, in substance, a refusal to perform her oral agreement to convey to him a tract of land in payment for that which he conveyed to her.

But the action must rest on the ground that the land does not exist, or if it does exist, that she refuses to convey it or cannot convey it. If it does exist, and she has good right to convey it, the bill of exceptions does not show that she has been in any fault. In her absence the plaintiff impliedly assented to the alterations which were made in the deed, and then accepted it. Until he shall have notified her of the alterations, and requested her to redeliver the deed, there will have been no refusal on her part to make it perfect, and thus convey to the plaintiff all that he was entitled to receive.

But if the plaintiff shall succeed in proving the non-existence of the land, his cause of action will not be the receipt of money by the defendant upon her sale of the land which he conveyed to her. He would have had a good cause of action if she had kept the land till the present time. His right to recover will be upon her implied promise to pay the agreed price for the land, namely, \$750. Such a cause of action is not properly described by a count for money had and received, but by a count for land sold and conveyed. The difference, however, is technical rather than substantial, and it will be in the power of the superior court to allow the plaintiff to add such a count by way of amendment. But the motion for amendment must be addressed to the discretion of that court. The presiding judge did not rule that the action could not be maintained on such a count, and the plaintiff's exceptions cannot be sustained. If he desires to proceed further in the action, he must begin by a motion to amend.

Exceptions overruled.

DEED EXECUTED WITH BLANK FOR NAME OF GRANTEE and left with an agent authorised by parol to fill the blank is ineffectual as a deed: *Blacknall v. Parish*, 78 Am. Dec. 239; *Voss v. Dolan*, 108 Mass. 169, citing the principal case.

MONEY PAID UNDER CONTRACT VOID BY STATUTE OF FRAUDS may be recovered back if the contract is rescinded: *Johnson v. Evans*, 50 Am. Dec. 669, note 672. An action for money had and received lies to recover back money paid by a party to an agreement which is invalid by the statute of frauds, and which the other party refuses to perform: *Williams v. Bemis*, 108 Mass. 92, 93; *Dix v. Marcy*, 116 Id. 417; *Riley v. Williams*, 123 Id. 509, all citing the principal case. When the promise of payment or of some other consideration has been relied upon as the consideration of a conveyance, and there is a refusal to perform, the other party may recover the value of the property upon an implied *assumpsit*: *Long v. Woodman*, 65 Me. 58; *Barter v. Greenleaf*, 65 Id. 406; *Root v. Burt*, 118 Mass. 523, all citing the principal case. When all the parts of an agreement which affect the obligation of either party to purchase or sell any interest in land have been fully performed, the

remaining obligations are no longer within the statute, although they may have been so while the contract continued executory: *Weatherbes v. Potter*, 29 Mass. 362; *Townsend v. Hargraves*, 118 Id. 334, both citing the principal case.

THE PRINCIPAL CASE IS CITED IN *Troubridge v. Weatherbes*, 11 Allen, 364, to the point that a promise to convey lands as a consideration is within the statute of frauds; and in *Nescomb v. Wallace*, 112 Mass. 26, to the point that a sale of land is a good consideration for the promise to make the payment therefor.

DURGIN v. MUNSON.

[9 ALLEN, 364.]

IN ACTION AGAINST OWNER OF RAILROAD, BROUGHT BY HIS SERVANT TO RECOVER DAMAGES FOR PERSONAL INJURY sustained by him from a locomotive-engine's running upon him from a turn-table in consequence of the want of a sufficient brake, the defendant may introduce evidence to show that the person who had charge for him of all the engines on the road had given instructions, before the accident, to the engineers to have the wheels of the engines blocked, while turning on the turn-table, and that this accident occurred by failure of some servant of the defendant to obey such instructions; although such instructions were not known to the plaintiff.

TORT to recover damages for an injury sustained by the plaintiff by reason of a locomotive-engine's running upon him from a turn-table, while turning upon it, in consequence of the want of a sufficient brake. The defendant was a contractor, engaged in filling in the Back Bay lands, and had a railroad and several engines and cars. He was not himself an engineer, and took no part in running the engines. The plaintiff was employed by the defendant, and had charge of the turning of the engines on the turn-table, and while he was so engaged, suffered the injury complained of. The judge instructed the jury that the plaintiff, to maintain his action, must convince them that the defendant employed a defective or unmanageable engine in his work; that in doing so he was guilty of gross negligence; that the plaintiff was injured by that negligence, without being himself guilty of any negligence. The question whether the engine was unsafe or not was one to be decided by them upon all the evidence. The plaintiff must prove that it was gross negligence on the part of the defendant to employ such an engine. If not, no action lay. If the employer is careful and does his duty, if he employs skillful men to buy and run his machinery, if he is not negligent in learning whether that machinery is safe or not, if in all things he does

his duty, then he is not liable for the consequences, if unsafe machinery is employed without his fault. The law which governs the rights of servants requires only ordinary care on the part of the employer. He is not liable unless he is guilty of gross negligence; with this qualification, that the degree of care required is greater where life and limb are endangered by want of it than where the consequences are less injurious. An engine might be so defective and unmanageable that a man could not use it and see it used in his business without being guilty of gross negligence; but an engine might be defective, and yet it might be used without gross negligence. So, if a party employs a skillful man to buy an engine, and to give a good price for it, and to go to a respectable manufacturer, and if his agent should procure a grossly defective and unmanageable engine, which should cause an injury to a servant before the employer had seen or could have seen the engine, that is a case where no action could be maintained. The fact that this engine or brake was less safe than others is not of itself sufficient to charge the defendant, even if he knew it. The machinery must have been so defective that it was gross negligence to use it. The jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The other facts appear from the opinion.

G. S. Boutwell, for the defendant.

D. H. Mason, for the plaintiff.

By Court, HOAR, J. We do not think that there was any such error or insufficiency in the charge of the judge as would give a reason for setting aside the verdict, although the important consideration that, to entitle the plaintiff to recover, he was bound to show that the engine was defective, and that the defendant knew, or in the exercise of ordinary care would have known, that it was defective, might perhaps have been more distinctly presented to the jury.

But the exception taken to the exclusion of the evidence offered by the defendant is a material one, and, in our opinion, well founded. The defect in the engine, which the plaintiff alleged as the cause of his injury, was the insufficiency of the brake to prevent the engine from running off while it was turned on the turn-table. The defendant proposed to show that the person who had charge for him of all the engines on the road had given instructions, before the accident, to the engineers to have the wheels of their engines "chocked" while

turning on the turn-table, and that this accident occurred by failure of some servant of the defendant to obey such instructions. The court ruled the evidence incompetent, as it was not shown that the instruction was given or known to the plaintiff. But proof that the accident which caused the injury to the plaintiff was caused by the neglect of a fellow-servant would have been a defense to the action; and the offer went to that extent. The defects of the engine in the abstract were not the gist of the plaintiff's complaint; but its defects at the time and for the service in which the defendant allowed it to be used when it ran onto the plaintiff. If it were fit and sufficient for use in the manner in which the defendant then allowed it to be used, its insufficiency for other service at other times would not concern the plaintiff. Now, it is plain that a machine may be safe and fit for one use when it is not for another. To put an extreme case, by way of illustration: Suppose the defendant had a worn-out engine, unfit for any service, and he had given orders that it should not be run at all, yet some workman had, without his knowledge, undertaken to run it, could the master be held responsible to the fellow-servant? Suppose a car that was not fit to run with steam-power was kept for use only when drawn by horses; or an engine, which had not the proper appliances for a locomotive, was employed solely as a stationary engine, would an unauthorized change of the use make the master liable? If this engine, when "choked" upon the turn-table, was absolutely safe against the possibility of running off, so that it needed no brake at all in that position, and it was not permitted to be turned until the blocking was applied to the wheels, it would be a question for the jury whether the want of a brake was the cause of the injury. There is no absolute requirement of law that the injurious action of a locomotive-engine shall be prevented by the specific expedient of a brake. If other sufficient means of safety, equivalent in effect, were supplied, that is all that is necessary; and the jury were to judge of their sufficiency. The fact that the orders to the engineers were not known to the plaintiff would not be decisive, because the question on that part of the case was, whether the engineers were careless, and by their failure to obey instructions the accident occurred.

The evidence which was rejected should therefore have been received, as having a direct tendency to show whether the defendant used such precautions and gave such rules for

the use of the engine in the condition in which it was at the time of the accident as made it then a proper instrument for the service to which it was to be applied.

Exceptions sustained.

LIABILITY OF MASTER FOR NEGLIGENCE OF FELLOW-SERVANT: See *Fraser v. Pennsylvania R. R. Co.*, 80 Am. Dec. 467, note 470, where other cases are collected. A party injured by the negligence of a fellow-servant cannot recover against the master: *Wood v. New Bedford Coal Co.*, 121 Mass. 287, citing the principal case. If a master uses reasonable care in employing suitable servants, in supplying and keeping in repair suitable structures and engines, and in giving proper directions and taking due precautions as to their use, he is not responsible to one servant for the negligence of another servant in their use and management in carrying on his work: *Holden v. Fitchburg R. R.*, 129 Id. 274; *Robertson v. Terre Haute & I. R. R. Co.*, 78 Ind. 80, both citing the principal case.

PLUMER v. LORD.

[9 ALLEN, 455.]

TO ORRANGE ESTOPPEL IN PAIN, STATEMENTS OR REPRESENTATIONS RELIED UPON must be shown to have been made with a willful intent to induce the party to whom they were made to act on the faith of them.

PERSON CANNOT BE ESTOPPED FROM DENYING THAT HE IS MEMBER OF FIRM by the representations of one who is merely the agent of the firm.

CONTRACT upon a promissory note signed by J. H. Lord & Co., and payable to the order of the plaintiff. On the trial, it appeared that at the time the note was given there existed a firm doing business in Boston under the name of J. H. Lord & Co.; that William Plumer, the plaintiff's husband, at that time acted as the financial agent of the firm, signed their notes, and drew their checks in the firm name, without signing his own as agent or attorney; that he had authority to do this by a written power of attorney from Margaret F. Plumer, one of the members of said firm, and verbally by the defendant; that on or about June 16, 1858, the plaintiff and defendant exchanged their respective notes, secured by mortgage on the separate real estate owned by each; that the plaintiff afterwards sold the defendant's note and mortgage, and the proceeds were lent to said firm, when the note in suit was made by said William Plumer and given to the plaintiff. To charge the defendant as a partner in said firm, the plaintiff offered to prove by Parna Towle that in 1857, in a conversation relative to the discharge of one person and the employment of another as clerk of said firm, the defendant said

"she did not think it was right, and would never consent to it; she had a right to object, as she was one of the partners or firm"; and that this statement was communicated to the plaintiff before the note in suit was given. The plaintiff further offered to prove various other conversations between herself and the defendant prior to the date of the note in suit, in which the defendant admitted herself to be a partner in the firm of J. H. Lord & Co.; and also a conversation with her husband, William Plumer, at the time when the defendant executed her note and mortgage to the plaintiff, in which he stated that the defendant was a partner in the firm, and that J. H. Lord was not. The plaintiff further offered to prove that she was induced by these various declarations to believe that the defendant was a partner in the firm, and to lend to the firm the money for which the note in suit was given, and that she would not otherwise have taken the note. The judge ruled that the doctrine of estoppel did not apply to this case, and if it did, the evidence offered was not sufficient to show an estoppel, and he directed a verdict for the defendant, which was accordingly rendered.

J. H. Wiggins, for the plaintiff.

A. A. Ranney, for the defendant.

By Court, BIGELOW, C. J. The plaintiff does not now seek to hold the defendant as being actually a copartner in the firm by whom the note declared on is signed. Yielding to the principle heretofore declared, that a wife cannot enter into a copartnership of which her husband is a member (*Lord v. Parker*, 3 Allen, 127), she seeks to avoid the effect of its application to this case by evidence which brings it, as she contends, within the doctrine of estoppel *in pais*, and precludes the defendant from alleging the non-existence of a copartnership of which she was a member. This same point seems to have been raised and overruled when this case was before the court at a previous term (*Plumer v. Lord*, 5 Id. 463); but as the evidence on which it rests is now presented more fully, and in a somewhat different aspect, we have deemed it not improper to reconsider the proposition on which the plaintiff relies to maintain her action.

Passing by the question whether a married woman can by any act or declaration in the country estop herself from setting up her legal incapacity to make a contract, and thus indirectly bind herself to fulfill obligations which she could not

assume directly, even by an instrument executed in the most solemn and formal manner,—a difficulty in the way of the plaintiff's right to recover of the most formidable character: *Lowell v. Daniels*, 2 Gray, 161, 168 [61 Am. Dec. 448],—we are of the opinion that the evidence offered at the trial is wholly insufficient to create the estoppel for which the plaintiff contends. The representations on which she relies all lack the vital element of having been made with a design that they should be acted on by the plaintiff. Estoppels are not favored in law, because they operate to shut out the truth and to prevent parties from asserting or defending their rights by proof of actual existing facts. They are therefore properly confined within very narrow limits, and are always required to be strictly made out. It is not sufficient, in order to bar a party from offering or relying upon evidence material to his case, to show that he has previously made statements or representations inconsistent with, or even directly contrary to, the facts which he proposes to prove, and that such statements or representations were acted on by the party to whom they were made. There must also be shown a willful intent to induce the party to act on the faith of the alleged statements or representations. This is the well-settled rule of law: *Pickard v. Sears*, 6 Add. & E. 474; *Freeman v. Cooke*, 2 Ex. 663; *Howard v. Hudson*, 2 El. & B. 1-10; *Audenried v. Betteley*, 5 Allen, 382, 385 [81 Am. Dec. 755]. No one of the declarations made by the defendant herself, which the plaintiff offered to prove, comes within this rule. They were all made prior to the time when the note in suit was given, and before the transaction took place out of which the consideration of the note is alleged to have arisen. Nor does it even appear that they were made with any intent to induce the plaintiff to give credit to the firm. They were mere casual declarations, which are not shown to have had any connection with the dealings or business transactions of the parties. They fall very far short of forming a groundwork for an estoppel.

In regard to the representations alleged to have been made by William Plumer, as agent of the defendant, to the plaintiff, if competent to be proved at all, the same difficulty exists. It does not appear that they were made at the time the note in suit was given, or with a design to procure such note from the plaintiff. It is true that it is shown that Plumer stated that the defendant was a copartner in the firm of J. H. Lord & Co. at the time the plaintiff and defendant agreed to exchange

their respective notes, secured by mortgages on the real estate owned by them respectively; but the evidence fails to prove that it was then agreed or understood that the note of the firm now in suit should also be given to the plaintiff. If there was no such understanding or agreement, then it is clear that the statements were not made with a design to induce the plaintiff to receive the note, and to advance money to the firm thereon. But even if it were otherwise, the plaintiff could not estop the defendant by any such declarations of Plumer, because it does not appear that he was authorized to make them on her behalf. He was the agent of a firm, not of the defendant. This firm was established by a written contract, and the agent had no authority to bind any one as a member of the firm beyond that which appeared on the face of this contract. If he mistook the legal effect of it, and in consequence of such mistake made misrepresentations as to the persons who composed the firm, he clearly exceeded his authority. As agent of the firm merely, he could not estop the defendant, because she was not a member of it, and he in fact had no authority to bind her beyond the legal scope of the contract into which she had entered; and as this did not and could not make her a member of the firm, he could not estop her by statements that she was a copartner.

Exceptions overruled.

ESTOPPEL IN FACT, WHAT CONSTITUTES: See *Dress v. Kimball*, 80 Am. Dec. 163, note 172, where other cases are collected. When a party willfully makes a representation of fact to another, and thereby induces him, acting upon the belief that such representation is true, to alter his position to his injury, the former is precluded from averring against the latter that his representation was not true, in a controversy between them relating to the subject-matter concerning which the representation was originally made: *Langdon v. Doud*, 10 Allen, 436; *Fall River National Bank v. Buffington*, 97 Mass. 501, both citing the principal case; *Driskell v. Mateer*, 80 Am. Dec. 105, note 107. The party setting up the bar must show that there was a willful intent to make him act on the faith of the representation, and that he did so act: *Andrews v. Lyons*, 11 Allen, 351; *Turner v. Coffin*, 12 Id. 402, both citing the principal case; *Driskell v. Mateer*, 80 Am. Dec. 105, note 107; *Audewierd v. Betteley*, 81 Id. 755, note 758.

THE PRINCIPAL CASE IS CITED in *Whelan v. Sullivan*, 102 Mass. 204, to the point that estoppels are not entitled to any peculiar favor.

RICE v. NICKERSON.

[9 ALLEN, 473.]

ONE WHO ABDUCTS MINOR CHILD IS LIABLE TO FATHER TO EXTENT OF HIS ACTUAL INJURIES sustained thereby, including reasonable and proper expenditures incurred in the attempt to regain the possession of the child.

WHERE FATHER, IN ACTION FOR ABDUCTION OF HIS MINOR CHILD, DISAVOWS ALL CLAIM FOR AGGRAVATION of damages for any malice on the part of the defendant, and rests his claim for damages solely on the ground that he had the rightful custody of the child, and that the defendant illegally removed him, in violation of his rights, evidence is not admissible, on the part of the defendant, to show that he took the child at the request of his mother, who had previously obtained a decree of divorce in another state awarding to her the custody of the child; or that, on the hearing in another proceeding, the child was examined separately and apart by the presiding judge, and then expressed a strong desire to go with his mother and remain with her.

TORT for the abduction of the plaintiff's minor son, aged nine years. At the trial the plaintiff introduced in evidence a copy of a decree of this court, made before the abduction, upon a writ of *habeas corpus* brought by the mother, ordering that the boy be remanded to his father's custody. The plaintiff, having testified that after the abduction he had caused search to be made in many places by detectives and others, was asked how much money he expended in this manner. The defendant objected to this question, but the judge ruled "that the plaintiff's duty was to make reasonable exertion for the recovery of his child; to this end it was his duty to incur reasonable expenses while there was probable cause to suppose he could thus obtain possession of him; that this did not give him the right to incur rash and unreasonable expenses at any time, nor any expenses when there was not reasonable ground to believe search would be successful; for such length of time as search might properly and reasonably be conducted with prospect of success, he might make reasonable and proper expenditures of money, which the jury are authorized to take as part of the damages sustained by the plaintiff." The judge thereupon admitted the evidence, confining it within the limits thus laid down. The defendant offered in evidence a copy of the record of a decree made by the circuit court of Delaware County, in Indiana, in a suit brought by the wife of the plaintiff, by which a divorce was granted to her, and the custody of the boy claimed to have been abducted was decreed to her. The defendant offered this

upon the ground that there was evidence in the case tending to show that he took the boy at the request of his mother. The judge ruled that, if the plaintiff had offered any evidence of malice on the part of the defendant in taking the child, and it should appear that the defendant knew of this decree at the time the child was taken, he should admit it; but as the plaintiff did not go upon the ground of malice in aggravation of damages, but rested his claim upon the ground merely that he had the rightful custody of the child, and that therefore the taking of the child was illegal, without any evidence of malice on the part of the defendant, he should, upon that state of the case, reject the evidence. The defendant then offered evidence to show that during the hearing upon the writ of *habeas corpus*, and before the decree was made therein, the boy was examined separately and apart by the presiding judge, and then expressed a strong desire to go with his mother and remain with her; but the judge rejected this evidence. The judge instructed the jury to state what part of the amount allowed by them for damages was for expenses incurred in search for the child. The jury found for the plaintiff, with four thousand two hundred dollars damages; two thousand two hundred dollars of which were for the expenses. The defendant alleged exceptions.

C. F. Blake, for the defendant.

D. Thaxter, for the plaintiff.

By Court, DEWEY, J. The rulings in the present case were correct. The material points as to the maintenance of the action were fully settled in the case of *Commonwealth v. Nickerson*, 5 Allen, 518. The defendant, although acting without any other purpose than to obey the order of those persons who illegally assumed to direct the removal of the boy from the custody of the father, became liable to the father to the extent of his actual injuries sustained thereby, and this would include reasonable and proper expenditures incurred in the attempt to regain the possession of the boy. The instructions of the court upon this subject to the jury were well and carefully stated: *Bennett v. Lockwood*, 20 Wend. 223 [32 Am. Dec. 532].

The copy of the record of the decree of the circuit court in Indiana was properly excluded. The proposed evidence of the wishes of the boy to go with his mother, stated to the presiding judge on the hearing of the writ of *habeas corpus*, was

also properly rejected. The plaintiff disavowed all claim for aggravation of damages, for any malice on the part of the defendant towards him in the acts which he had done, and rested his claim for damages solely on the ground that he had the rightful custody of the child, and that the defendants had illegally removed him, in violation of his rights.

The exceptions must therefore be overruled, and judgment entered for the plaintiff for the larger sum found by the jury.

DAMAGES FOR ABDUCTION OF CHILD: *Mages v. Holland*, 72 Am. Dec. 341, note 347, where other cases are collected.

THE PRINCIPAL CASE IS CITED IN *Ames v. Union Railway*, 117 Mass. 543, to the point that the relation of master and apprentice is such as will sustain an action in the name of the master for an injury to the apprentice causing disability *per quod servitium amittit*.

GARDNER v. LANE.

[9 ALLEN, 482.]

ATTACHING CREDITOR CANNOT AVOID SALE AND DELIVERY OF PERSONAL PROPERTY on the mere ground that such sale was made with intent to prefer another creditor, in violation of the provisions of the insolvent law.

WHERE CERTAIN NUMBER OF BARRELS OF NO. 1 MACKEREL ARE SOLD, and by mistake some barrels of No. 3 mackerel and some barrels of salt are delivered, no title to the articles thus delivered by mistake passes to the purchaser.

WHERE WRIT COMMANDING OFFICER TO REPLEVY CERTAIN NUMBER OF BARRELS of mackerel is, with the assent of the defendant, executed by taking in part two half-barrels as equivalent to one barrel, the defendant cannot claim a return thereof on the ground that the officer seized property not described in his writ.

WHERE, UNDER SALE OF NUMBER OF BARRELS OF MACKEREL, DELIVERY IS MADE which includes some mackerel packed in half-barrels, the title will pass to the purchaser if the property is of the same kind and quality as that which the parties intended to include in their agreement.

REPLEVIN. The writ commanded the officer to replevy "135 barrels of No. 1 mackerel, 46 barrels of No. 3 mackerel, and 48 barrels filled with salt, together with the salt contained therein." The return showed that he took 32 barrels and 15 half-barrels of No. 1 mackerel, 49 barrels and 2 half-barrels of No. 3 mackerel, and 48 barrels of salt. The answer averred that the defendant had the property in his possession under a writ of attachment against George F. Wonson and others, and that the property belonged to them. On the trial it appeared

that in November, 1862, Wonson and Brothers, being indebted to the plaintiff, bargained to him in payment 135 barrels of No. 1 mackerel, and gave him a bill of sale thereof, whereupon he discharged his claim against them and paid them the difference, \$58.59. No delivery was made at that time; but on the 5th of January, 1863, Wonson went with the plaintiff to a wharf, and counted out 85 barrels of mackerel which both supposed to be No. 1, and these were delivered to the plaintiff and left there. They then went to a store, and Wonson counted off two rows, containing, as he said, 50 barrels, marked the barrel at the end of each row, and gave the plaintiff a storage receipt. Before they were removed the attachment by the defendant was made. The defendant offered to show that Wonson & Co. were insolvent, and that proceedings against them as insolvent debtors were duly commenced the day after the service of the replevin. But the judge ruled that, as the assignees were not parties to this action, the proposed evidence of proceedings in insolvency was inadmissible. The first instruction asked by the defendant, as modified by the court, is as follows: "That inasmuch as the 18 half-barrels of mackerel replevied by the defendant were not embraced or named in the bill of sale nor in the storage receipt, and if the jury are not satisfied, on the evidence introduced, that any half-barrels were ever sold or attempted to be delivered to the plaintiff, the plaintiff had established no title or right of possession to said half-barrels at the time of the service of the replevin. But if there were a delivery of one or more entire piles or rows of barrels which afterwards proved on examination to contain some half-barrels, the plaintiff, if he chose, could hold them on such delivery, if his title were in other respects made out, even though both parties at the time supposed the barrels so delivered were all of them whole barrels." The second and third prayers for instructions by the defendant, which the court refused, were as follows: "2. That inasmuch as there were replevied by the plaintiff's writ 45 barrels of No. 3 mackerel and 48 barrels of salt, and inasmuch as the bill of sale and the storage receipt were of No. 1 mackerel, and if the jury believe that the attempted delivery was to apply to and consist of No. 1 mackerel only, and by mistake or accident in such delivery, there were No. 3 mackerel and salt, the bill of sale, receipt, and delivery do not operate to convey to the plaintiff the No. 3 mackerel and the salt, and the defendant is entitled to a return to that extent; 3. That

the writ not directing the officer to replevy any half-barrels, the officer serving it would not be entitled to take and replevy such half-barrels, and the defendant is entitled to a return of them." The jury returned a verdict for the plaintiff, and the defendant alleged exceptions. The other facts are stated in the opinion.

J. G. Abbott and L. Child, for the defendant.

J. C. Perkins, for the plaintiff.

By Court, BIGELOW, C. J. 1. The evidence offered by the defendant and rejected was clearly incompetent. This is not an action in which an assignee in insolvency is seeking to recover property belonging to the insolvent debtor for the purpose of distribution among all the creditors. It is a controversy between two creditors, each of them striving to hold property of their debtor against the other for the purpose of appropriating it in payment of their pre-existing debts, by way of preference over other creditors. Neither of them can claim any rights in this action under the proceedings in insolvency. The provisions of the insolvent laws for the avoidance of sales, transfers, and attachments, which may operate as a preference, are designed exclusively for the benefit of those who come in under the assignee or otherwise to obtain an equal share of the property of the insolvent in the mode provided by law; and these provisions cannot be invoked in aid of a person who stands only in the position of a creditor, endeavoring to secure his whole debt, either by means of a sale or by an attachment: *Penniman v. Cole*, 8 Met. 496, 500; *Burt v. Perkins*, 9 Gray, 320. The rights of creditors under the insolvent proceedings can in no way be affected by the result of the issue between the parties to this suit. If the property in controversy can be rightfully claimed by the assignee in insolvency for the benefit of creditors, his title to it can be asserted with like effect, whether the plaintiff or the defendant succeeds in establishing a right of possession and property in this action.

2. Other and more interesting questions were raised at the trial, and remain to be considered. The first and most important one is, whether on the evidence adduced at the trial any title passed to the plaintiff, under the contract of sale set up by him, to that part of the property replevied, which is described in the writ "as 46 barrels of No. 3 mackerel and 48 barrels filled with salt." The facts in regard to the articles are few and simple. The plaintiff entered into a contract of

sale with the original owners of the property, under whom both parties claim, for 135 barrels of No. 1 mackerel, at \$10 per barrel, amounting with inspector's fees to \$1,397.25, for which payment was made by the plaintiff by releasing claims against the vendors for about \$1,350, and by money to the amount of about \$55. This transaction took place on the twenty-sixth day of November, 1862. No delivery, however, of the mackerel included in the contract of sale then took place, but subsequently, five or six weeks afterwards, a delivery was made of certain barrels supposed to contain No. 1 mackerel, in pursuance of the contract; of the barrels so delivered, a large number did not contain No. 1 mackerel, but instead thereof, 45 barrels contained No. 3 mackerel, and 48 contained salt only, and these were delivered by mistake as a part of the 135 barrels of No. 1 mackerel which were agreed to be sold to the plaintiff.

On these facts, it seems to us to be inconsistent with elementary principles to hold that any property in the barrels of No. 3 mackerel and of salt passed to the plaintiff. To constitute a valid sale of goods, wares, and merchandise, complete and consummate, so as to pass the property to them, there must be an agreement or contract of sale by which the vendor agrees that the articles shall pass to and become the property of the vendee. Without such contract or agreement there can be no sale. Delivery is not always essential. As between the vendor and vendee of specific chattels *in esse*, the title will pass when the contract of sale is complete without delivery. But the minds of the parties must meet, and there must be a mutual assent to the transfer of certain specified property, before any change of title to it can be effected. Until this takes place, that is, until there is an agreement to sell certain specific identical goods, there can be no actual sale or change of ownership. So strictly is this held, that where goods, part of an entire bulk or mass, are agreed to be sold, the contract of sale is deemed to be incomplete and no property passes if such part has not been separated or designated in such manner that it may be distinguished from the mass or bulk with which it is mingled. Until the parties are agreed as to the specific, identical goods, the contract can be no more than an agreement to supply goods of a certain kind or answering a particular description. The reason of this is obvious. There can be no transfer of property until the parties have ascertained and agreed upon the articles sold. Before they

are designated and set apart in some form, there is nothing to which the contract of sale can attach, or on which it can operate: Chit. Con., 10th Am. ed., 393-398; *Aldridge v. Johnson*, 7 El. & B. 885; *Scudder v. Worster*, 11 Cush. 573. It necessarily follows from these familiar principles, that where parties to a contract of sale agree to sell and purchase a certain kind or description of property not yet ascertained, distinguished, or set apart, and subsequently a delivery is made, by mistake, of articles differing in their nature or quality from those agreed to be sold, no title passes by such delivery. They are not included within the contract of sale; the vendor has not agreed to sell nor the vendee to purchase them; the subject-matter of the contract has been mistaken, and neither party can be held to an execution of the contract, to which he has not given his assent. It is a case where, through mutual misapprehension, the contract of sale is incomplete. Delivery of itself can pass no title; it can be effective and operative only when made as incidental to and in pursuance of a previous contract of sale. Such a case seems clearly to fall within that class in which, through mistake, a contract which the parties intended to make fails of effect; as where, in a negotiation for a sale of property, the seller has reference to one article and the buyer to another, or where the parties supposed the property to be in existence when in fact it had been destroyed. In such cases the contract is ineffectual, because the parties did not in fact agree as to the subject-matter, or because it had no existence: *Rice v. Dwight Mfg. Co.*, 2 Cush. 86. So in the case at bar. The contract of sale did not pass the property as against attaching creditors, because there was no delivery to the vendee of that which constituted the subject-matter of the contract; the delivery of different articles from those embraced in the contract is inoperative, for the reason that there is no agreement for their purchase and sale. And this is the precise distinction which marks the line between the case at bar, and those cited by the learned counsel for the plaintiff. In all of the latter, the particular articles which formed the subject of the sale and delivery were mutually agreed upon; there was no mistake or misapprehension concerning them; the same goods which the vendor agreed to sell and the vendee to buy were delivered. The mistake was only as to the quality of the article; it was the same identical thing in specie as that respecting which the parties had negotiated. Although in such cases there can be no doubt of the

right of the vendee to rescind the sale and return the property, by reason of a breach of warranty or fraud, there is as little doubt that the title to the property passes, subject only to such disaffirmance by the vendee. The error at the trial consisted in losing sight of the distinction between cases of this character and the one at bar; between an agreement to sell and deliver a specified article, concerning the quality of which the parties were deceived or mistaken, and an agreement to sell one article and a delivery by mistake of a wholly different article, which did not form the subject-matter of the agreement. In the former the title passes at the election of the vendee; in the latter it does not. This view of the principles of law applicable to the facts developed at the trial shows very clearly that the second instruction asked for by the defendant was in substance correct, and should have been given to the jury as the ruling by which they were to be governed in considering and applying the testimony.

8. It is somewhat difficult to understand the precise posture of the case at the trial on the point raised in the third prayer for instruction submitted by the defendant. We are by no means sure that the point is open on the pleadings; but assuming it to be so, we do not think it tenable. It is certainly true, as an abstract proposition, that an officer in serving a writ of replevin can take only such property as properly comes within the terms of the description contained in the writ. But it is an error to suppose that the term "barrel" necessarily imports a definite and precise description of a particular article or thing. It may be and often is used to designate a certain quantity, and not the vessel or cask in which an article is contained. There is nothing on the face of the writ to show that it was used in the latter sense; on the contrary, the evidence tended very clearly to show, and the jury have found under the instructions of the court, that the term "barrel" was not intended as a precise and definite description of the specific articles which the sheriff was commanded to replevy, but as a designation of the quantity of a particular kind or quality of mackerel which he was to take, irrespective of the mode in which it was packed, or the particular vessels or casks in which it was contained. Nor does the case stop here. It appears that the defendant so understood the description in the writ, and assented that it should be served by taking a sufficient number of half-barrels to make up the quantity which the sheriff was required to replevy. After such assent, the defendant cannot be permitted to say that the description in the writ was imperfect or insuffi-

cient to warrant the service of the writ. The plaintiff having acted on the strength of the assent of the defendant, and incurred the expense of completing the service and prosecuting the suit for the purpose of litigating the title to the property which was actually replevied, it would be unjust and unreasonable to allow the defendant now to defeat the right of the plaintiff to hold a part of the property on the ground of any defect or ambiguity in the description of the property in the writ.

4. The only remaining point of exception arises on the first prayer for instruction. It seems to us the verdict rendered under the instructions given leaves no question open to the defendant on this point of the case. The jury must have found that the half-barrels of mackerel were included in the sale and delivery. A mere mistake in the bill of sale, or the description of the mode in which the property was packed, would not prevent the property passing by the delivery, if it was of the same kind and quality as that which the parties intended to include in their agreement.

The result is, that the case must go to a new trial, in consequence of misdirection on the point raised in the second prayer for instructions submitted by the defendant.

Exceptions sustained.

PURCHASER OF GOODS FROM FRAUDULENT VENDOR MAY TRANSFER TITLE thereto to a *bona fide* purchaser at any time before the creditors of the fraudulent vendor take steps to divest him of the property: *Sharp v. Jones*, 81 Am. Dec. 359, note 361.

CONSENT OF BOTH PARTIES TO CONTRACT IS NECESSARY: See *Moore v. Pearson*, 71 Am. Dec. 409, note 421. When a material mistake occurs in respect to the nature of the subject-matter of a sale, there is no mutual assent, and therefore no valid contract: *Gardner v. Lane*, 12 Allen, 94; *Parrieh v. Thurston*, 87 Ind. 438, both citing the principal case.

WHAT CONSTITUTES SALE: See *Huthmacher v. Harris*, 80 Am. Dec. 502, note 504. To constitute a contract of sale there must be an agreement by the vendor that specific articles shall pass to and become the property of the vendee: *Harvey v. Harris*, 112 Mass. 37, citing the principal case.

FRAUDULENT SALE BY DEBTOR MAY BE AVOIDED BY ASSIGNEE in insolvency subsequently appointed, in proceedings in insolvency instituted for that purpose: *Day v. Bardwell*, 97 Mass. 253, citing the principal case; and only in that way: *National Mechanics' and Traders' Bank v. Eagle Sugar Refinery*, 109 Id. 140, also citing the principal case. A deputy sheriff, if satisfied of the fraudulent character of a sale, only does his duty by surrendering the property to the assignee of the fraudulent vendor, but by doing so without suit he assumes the burden of establishing the fraudulent character of his title: *Leggett v. Baker*, 13 Allen, 472, citing the principal case.

THE PRINCIPAL CASE CAME BEFORE THE COURT ON TWO subsequent occasions, and is reported in 12 Allen, 39, and in 98 Mass. 517.

KIMBALL v. ÆTNA INSURANCE COMPANY. KIMBALL v. SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

[9 ALLEN, 540.]

WHEREAS APPLICANT FOR INSURANCE ON BUILDING MAKES EXPRESS ORAL PROMISE that it shall be occupied, and a policy is thereupon delivered to him, such policy will not be avoided by his subsequent failure to fulfill such promise, unless fraud is proved, even though the risk be increased by the buildings being unoccupied.

CONTRACT on policies of insurance upon a dwelling-house of the plaintiff. The plaintiff applied to the agent of the companies for insurance on the 17th of January, 1862, while the house was unoccupied. The agent informed him that unless the house was occupied he could not renew the insurance on it without consulting the companies and stating all the facts, and in that case he did not think the companies would authorize him to insure the property at all, but if occupied, it could be insured at the same rate as in previous years. The plaintiff replied that the house would be occupied; that he had a man in view who was going to occupy it. The agent thereupon wrote and delivered the policies. The house remained unoccupied until June 26, 1862, when it was burned by an incendiary. It was admitted that the occupancy of the house was a material fact under the circumstances. The judge ruled that the representations, if proved, would not constitute a legal defense, and instructed the jury to return verdicts for the plaintiff, which was accordingly done. The defendants alleged exceptions.

J. W. Perry and W. C. Endicott, for the defendants.

E. Avery and S. B. Ives, Jr., for the plaintiff.

By Court, GRAY, J. The ruling of the judge who presided at the trial was in accordance with the opinion which had been repeatedly expressed by this court in previous cases: *Higginson v. Dall*, 13 Mass. 99, 100; *Whitney v. Haven*, 18 Id. 172; *Rice v. New England Ins. Co.*, 4 Pick. 442, 443; *Bryant v. Ocean Ins. Co.*, 22 Id. 200. That opinion has been ingeniously and elaborately criticised and controverted by learned writers, to whose commentaries the defendants have referred; but a careful re-examination has satisfied us that it is founded upon

elementary principles of the law of insurance, and supported by the adjudged cases in England and in the United States.

The contract of insurance is a contract to indemnify the owner of certain property against certain risks. This contract is founded upon the representations previously made by the assured to the insurer. The condition and circumstances of the property are within the knowledge of the owner more than of the insurer, and must be truly represented by the former to the latter, in order that he may estimate the risk before entering into the contract. In making this representation, the utmost good faith is required. If an existing fact material to the risk is misrepresented by the owner to the underwriter, the minds of the parties never meet, they agree on no subject-matter to which the contract can attach; the contract founded on such misrepresentation never takes effect, the underwriter may treat it as a nullity, and the other party, unless chargeable with fraud, may recover back the premium. If representations, whether oral or written, concerning facts existing when the policy is signed, are false, it never has any existence as a contract, unless it contains in itself terms which expressly or by necessary implication waive or supersede the previous representations. If the representations are positive, and not of mere opinion or belief, it matters not whether they are made at or before the time of the execution of the policy, nor whether they are expressed in the present or the future tense, if they relate to what the state of facts is or will be when the policy is executed and the risk of the underwriter begins. If the facts are then materially different from the representations, the whole foundation of the contract fails, the risk does not attach, the policy never becomes a contract between the parties. Representations of facts existing at the time of the execution of the policy need not be inserted in it, for they are not necessary parts of it, but, as is sometimes said, collateral to it. They are its foundation; and if the foundation does not exist, the superstructure does not arise. Falsehood in such representations is not shown to vary or add to the contract, or to terminate a contract which has once been made, but to show that no contract has ever existed.

The word "representations" has not always been confined in use to representations of facts existing at the time of making the policy, but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance; in other words, not to the

present, but to the future; not to facts which any human being knows or can know, but to matters of expectation or belief, or of promise and contract. Such statements (when not expressed in the form of a distinct and explicit warranty which must be strictly complied with) are sometimes called "promissory representations," to distinguish them from those relating to facts, or "affirmative representations." And these words express the distinction; the one is an affirmation of a fact existing when the contract begins; the other is a promise, to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representation may be inserted in the policy itself; or it may be in the form of a written application for insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this written instrument is the expression, and the only evidence, of the duties, obligations, and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written; for if it does not exist, there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract.

The distinction between representation of facts existing when the policy was signed, which if untrue would prevent its taking effect as a contract, and representation of what should exist in the future, which would not avoid the policy if merely false and not fraudulent, was pointed out by Lord Mansfield. In the leading case of *Carter v. Boehm*, 3 Burr. 1099, which was of an insurance of a fort in the East Indies against loss by capture by a foreign enemy, he laid down the general principles as to concealment or misrepresentation of existing facts, saying: "Insurance is a contract upon speculation. The special facts upon which the contingent chance is

to be computed, lie most commonly in the knowledge of the insured only; the underwriter trusts to his representation, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement." This last proposition is reported in slightly different language by Sir William Blackstone, thus: "If a concealment happens, without any fraudulent intention, by mistake of the principal or his agent, still the policy is void, because the risk which is run is not that which the underwriter intended": S. C., 1 W. Black. 594. Lord Mansfield, in the same opinion, repeated the statement that concealment, whether designed and so fraudulent, or undesigned and materially changing the risk, would have the same effect, saying: "The question therefore must always be, whether there was, under all the circumstances, at the time the policy was underwritten, a fair representation; or a concealment, fraudulent, if designed; or, though not designed, varying materially the object of the policy, and changing the risk understood to be run": *Carter v. Boehm*, 3 Burr. 1911. In *Pawson v. Watson*, Cowp. 785, it was represented to Ewer, an underwriter on the Julius Cæsar, that "she mounts twelve guns and twenty men"; but to Watson and others only that she was "a ship of force." There were neither men nor guns on board at the time of the insurance; and at the time of her capture she had less than twelve carriage guns and less than twenty able men, but so many swivels and boys as to be stronger than if she had had that number. The actions against all the underwriters were tried together, and the only question reserved for the whole court was, "whether the written instructions which were shown to the first underwriter are to be considered as a warranty inserted in the policy, which must be strictly complied with, or as a representation which could only avoid the policy, if fraudulent"; and the court held them to be a representation only: *Pawson v. Watson*, Cowp. 786; S. C., 1 Doug. 11, note. But Lord Mansfield, in his report of

the trial, said that he was of opinion "that it would be of very dangerous consequence to add a conversation that passed at the time as part of the written agreement"; "but secondly, if these instructions were to be considered in the light of a fraudulent misrepresentation, they must be both material and fraudulent". *Pawson v. Watson*, *supra*. And in delivering the opinion of the court, he said of the representation by the assured to Ewer: "There is no fraud in it, because it is a representation only of what in the then state of the ship they thought would be the truth; and in real truth the ship sailed with a larger force"; and that Ewer had "determined whether it should be in the policy or not, by not inserting it himself": *Pawson v. Watson*, Cowp. 789, 790. So in *Bize v. Fletcher*, 1 Doug. 285, 289, S. C., Park on Insurance, 7th ed., 314, 315, Lord Mansfield held that a representation not made part of the policy, that the ship should go to China, could not, unless fraudulent, be introduced to limit the policy, which in terms extended to all ports and places beyond the Cape of Good Hope; and a verdict was found for the plaintiff and acquiesced in. The opinion of Lord Mansfield, that actual fraud was necessary to be proved in order to avoid a policy for a mistake in asserting "what would be the truth" in the future, is brought out still more clearly in a later case of misrepresentation of an existing fact, as to which it was held that, if the assured made representations to the underwriter without knowing the truth, he took the risk upon himself, although there was no evidence of actual fraud; and Lord Mansfield pointed out the distinction that in the case of the *Julius Cæsar* the ship was only fitting out and had no guns or men on board when the insurance was made: *Macdowall v. Fraser*, 1 Doug. 261.

In *Driscoll v. Passmore*, 1 Bos. & P. 200, in the common bench, no decision was made upon this question. There, a vessel, being about to sail from Lisbon to Madeira, thence to Saffi, and thence back to Lisbon, insurance on the freight from Saffi to Lisbon was applied for, without success, because of the distant period at which the risk was to begin; but was subsequently made on a representation of the intended round voyage, and that the ship had arrived at Madeira, and was about to proceed on her voyage immediately. The ship, on her arrival at Madeira, was obliged, by the refusal of the crew to go on to Saffi, to put back to Lisbon, and was thence ordered by the charterer to Saffi, and lost on her way back from Saffi to Lisbon. The only point decided was, that the voyage in-

sured, being from Saffi to Lisbon only, was substantially performed. None of the judges suggested that subsequent non-compliance with an oral representation would defeat the policy. On the contrary, Eyre, C. J., said: "That representation was really true at the time that it was made, and the underwriter was to form his own conclusion of the time when the Timandra would arrive at Saffi. If the insurance was made on a representation which was true at the time, it will be difficult to state a case where subsequent events, not happening through misconduct, and not totally disappointing the voyage, will discharge the underwriter. He formed his judgment of the case, knowing that all was executory, and that an alteration might arise of a kind that might increase his risk upon the representation made to him to underwrite." And in *Weston v. Emes*, 1 Taunt. 115, in the same court, the insurers offered to show that, before the execution of a policy on goods for a certain voyage "in ship or ships," it was orally agreed that a particular ship should not be included. But the whole court "determined that the evidence could not be admitted without abandoning in the case of policies the rule of evidence which prevails in all other cases; and that it would be of the worst effect if a broker could be permitted to alter a policy by parol accounts of what passed when it was effected. The court also observed that Lord Mansfield says of misrepresentations that they must be of a matter collateral to the contract; but that this was part of the contract."

In *Edwards v. Footner*, 1 Camp. 530, a week before the policy on the vessel was signed it was represented to the underwriter that she was to sail with two armed ships, and to carry ten guns and twenty-five men. The reporter, after stating this, simply says: "There was no evidence of any conversation upon the subject having passed between the parties, either when the policy was signed or in the intervening period. In fact, the Fanny sailed by herself, and carried only eight guns and seventeen men." The report does not show whether the ship had or had not sailed when the policy was signed. The only point raised or denied was, whether the court could look back to the previous conversation, or must be confined to what took place at the time of subscribing the policy; and upon that Lord Ellenborough ruled that the previous conversation "must be referred to the policy, and treated as a representation which required to be substantially complied with on the part of the assured." But he gave no inti-

mation that oral representations, made in good faith, of what should take place during the term of the insurance, could be admitted to control the policy. And such a position could hardly be reconciled with the contemporaneous case of *Bowden v. Vaughan*, 10 East, 415, in which the owner of a cargo, applying for insurance, having represented that the ship would sail in a few days, the same eminent judge submitted to the jury, as the turning point in the case, the question whether the representation was made in good faith, advising them, indeed, to take into consideration that the owner of the goods had no control of the vessel, but not making that decisive of the case; and the jury having found that it was made in good faith, the court of king's bench gave judgment on the verdict for the plaintiff.

Lord Ellenborough's successor, Lord Tenterden, reaffirmed the distinction between oral representations as to the present and as to the future condition of the subject insured. An applicant for insurance on a ship represented to the underwriter, at the time of his signing the policy, that she was to carry only so much salt as would put her in ballast trim. The ship was in fact deeply laden with salt, but whether shipped before or after the representation did not appear. Lord Tenterden instructed the jury to find for the defendant if they thought that a material misrepresentation was made as to the quantity then on board, but for the plaintiff if they thought that the representation was respecting the cargo expected to be shipped. The jury found that the misrepresentation was not material, on evidence which was thought sufficient by the full court, who on that ground refused a new trial, without passing upon this point: *Flinn v. Headlam*, 9 Barn. & C. 693. Upon the trial, within a month after the decision of this case, of an action upon another policy on the same ship, the evidence was similar, and the defense relied on was the misrepresentation that the salt would not exceed the amount necessary for ballast. But Lord Tenterden instructed the jury that the defendant would not be entitled to a verdict unless he satisfied them that there was a fraudulent misrepresentation of the cargo which the ship was to carry; that "the mere fact of a misrepresentation, without fraud, will not be enough to prevent the plaintiff's recovering; for the contract between the parties is the policy, which is in writing, and cannot be varied by parol": *Flinn v. Tobin*, Moody & M. 367.

The case perhaps most often cited, as showing that an oral

promissory representation may be set up to defeat a written policy, is *Dennistoun v. Lillie*, 3 Bligh, 202. But an examination of the facts of the case shows that the representation to the underwriters was in no sense promissory, or relating to anything after the execution of the policy. The representation was contained in a letter received and shown to the underwriters in June, which stated that the ship would sail from Nassau on the 1st of May; she had sailed on the 23d of April, and been lost on the 11th of May; so that the representation, as made to the underwriters, was an untrue statement of a past fact. It was so distinctly pleaded, as appears by the report of the same case in 1 Shaw's Appeal Cases, 23. Lord Eldon so treated it after the argument, stating the question to be "whether it is a representation of an expectation, or a statement as of a past fact, which is material to the risk": *Dennistoun v. Lillie*, 3 Bligh, 209. In announcing his final opinion, he omitted the word "past," before "fact," and said, "There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial, but the latter avoids the policy if the fact misrepresented be material to the risk": *Dennistoun v. Lillie*, *supra*. Yet the report clearly shows that the chancellor was merely reaffirming his original opinion; and used "fact" as past, opposed to "expectation," which was future; and did not intend to speak of anything in the future, which no human being could control, as a fact.

Alsop v. Coit, 12 Mass. 40, falls within the same class. The vessel which was represented to sail with convoy had, in fact, sailed without convoy, and been captured when the representation was made. Mr. Justice Jackson, delivering the opinion of the court, said: "The underwriter could not suppose, when signing such a policy, that the vessel had sailed two days before the letter was written, and that the frigates which were to protect her were still in port." So in *Von Tungeln v. Dubois*, 2 Camp. 151, *Feiss v. Parkinson*, 4 Taunt. 640, and *Vandenhoevel v. Church*, 2 Johns. Cas. 173, note, the misrepresentations were as to the documents or national character of the ship at the time of the insurance.

In several of the cases cited by Mr. Duer, there was no oral representation whatever. The decision in *Steel v. Lacy*, 8 Taunt. 290, 298, went upon the ground that, in the absence of all warranty or representation, a ship was bound to carry the documents necessary to establish her national character. In

Vandenheuvel v. United Ins. Co., 2 Johns. Cas. 127 [1 Am. Dec. 180], the ship was warranted American on the face of the policy. In *Murray v. Alsop*, 3 Id. 47, the representation on which the policy issued was in writing, resembling the applications for insurance against fire recently in use in this commonwealth.

The law seems to be settled in New York in accordance with that of England and of Massachusetts. In *Vandervoort v. Smith*, 2 Caines, 155, it was held that a policy on a vessel "from New York to two ports on the coast of Brasil" could not be controlled by a previous statement of the assured to the underwriter that the ports were only four or five hours' sail apart, although the premium on such a risk would have been less. The case decided in the same year, of *Suckley v. Delafeld*, 2 Id. 222, in which a representation (whether oral or written does not appear) was held to have been substantially complied with, contains no intimation of an opposite rule. In a subsequent case, singularly like those now before us, upon a policy of insurance on a house against loss by fire, the defendants proved that before obtaining the policy the plaintiff used a fireplace in the basement, and on the defendants' refusing, for that reason, to insure, promised to abandon the use of the fireplace and use a stove instead, but did not keep this promise. The supreme court, without much consideration, citing no cases except *Edward v. Footner*, 1 Camp. 530, and *Biss v. Fletcher*, 1 Doug. 285, and without any notice of the difficulty of controlling the performance of a written contract by a previous oral statement, held that the action could not be maintained: *Alston v. Mechanics' Ins. Co.*, 1 Hill, 510. But this judgment was unanimously reversed by the court of errors, in accordance with a very able opinion of Chancellor Walworth: 8. C., 4 Hill, 329. See also *Murdock v. Chenango County Ins. Co.*, 2 N. Y. 221; *Allegre v. Maryland Ins. Co.*, 2 Gill & J. 186 [20 Am. Dec. 424]. We do not find that Mr. Duer's views have been approved in any court in New York, except in a single instance, by one judge of the superior court of the city of New York, while Mr. Duer was a member of that court: *Bilbrough v. Metropolis Ins. Co.*, 5 Duer, 593.

In the cases now before us, there was no representation that the house was already occupied, and no representation or agreement that it should be occupied the instant the policies took effect. The plaintiff's statement was, that "the house

would be occupied; that he had a man in view who was going to occupy it." There is nothing to show that this statement was not made in the most perfect good faith. Giving it the strongest possible interpretation against the plaintiff, it was a promise that the house should be occupied within a reasonable time, and the policies attached as soon as they were made, and continued in force until such reasonable time had elapsed. The policies having once taken effect cannot be terminated or avoided, in the absence of fraud, by the subsequent breach of an oral agreement made before they were executed. The cases come exactly within the rule laid down by Chief Justice Shaw, and confirmed by the opinion of the whole court, in *Bryant v. Ocean Ins. Co.*, 22 Pick. 201: "The evidence offered was not admissible for any other purpose than to prove a fraudulent intent on the part of the insured to mislead the defendants, and to induce them to take the risk, or to take it at a lower premium than they otherwise would have done; as a representation, not of a fact, but of an intention, it did not avoid the policy, unless made with a fraudulent intent; as it related solely to the employment of the vessel within the time for which she was insured, it was not of an independent or collateral fact affecting the risk, but was embraced in the terms of the contract, and must be considered as absorbed in the contract afterwards formally executed, or as by mutual consent withdrawn and waived by the execution of the policy."

This subject illustrates the wisdom of the common law in taking for its guides judicial opinions, given after argument, under the responsibility of determining the rights of parties in actual controversies, rather than the theories of scholars and commentators, however learned or acute.

It may be added that the legislature of the commonwealth seem to have assumed the law upon this question to be settled in favor of excluding such evidence as was here offered. Before the policies in suit were made, it was provided by the statute of 1861, c. 152, that in fire insurance "the conditions of the insurance shall be stated in the body of the policy, and neither the application of the insured nor the by-laws of the company as such shall be considered as a warranty or part of the contract." The legislature can hardly have contemplated that, while separate writings should pass for nothing, oral promises might control the policy.

Exceptions overruled.

REPRESENTATION ON EXPROPRIATION, DIFFERENCE BETWEEN AND THAT ON EXISTING FACT: See *Herrick v. Union M. F. I. Co.*, 77 Am. Dec. 244, note 246; *Hough v. City F. I. Co.*, 76 Id. 581, note 589; *Joyce v. Maine I. Co.*, 71 Id. 536. Representations made to the insurer before or at the time of making the contract are the basis of the contract. If wrongly presented in any respect material to the risk, the policy that may be issued thereupon will not take effect: *Campbell v. New England M. L. I. Co.*, 98 Mass. 390; *Eastern R. R. Co. v. Relief F. I. Co.*, 98 Id. 426; *Goddard v. Monitor I. Co.*, 108 Id. 59, all citing the principal case. False statements, if not incorporated into the policy, must be disregarded in determining the rights of the insured: *Taylor v. Atha Ins. Co.*, 120 Id. 256, citing the principal case.

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ADVERSE POSSESSION.

1. LEGISLATURE HAS POWER TO EXTEND CONCLUSIONS OF LAW ARISING FROM ADVERSE POSSESSION to such cases and to such circumstances as it may deem best for the public good. *McCagg v. Heacock*, 327.
2. PAYMENT OF TAXES FOR SEVEN SUCCESSIVE YEARS, UNDER CLAIM AND COLOR OF TITLE, made in good faith, and after possession taken under such color of title, creates a legal conclusion, by virtue of the statute, that the possessor was the true owner to the extent and according to the purport of his paper title. *Id.*

See COLOR OF TITLE; STATUTE OF LIMITATIONS, 7.

AGENCY.

1. GENERAL AGENCY TO LOAN MONEY AND TAKE SECURITY FOR ITS PAYMENT does not imply an agency to collect money. *Cooley v. Willard*, 296.
2. AGENCY OF PERSON TO COLLECT MONEY IS NOT TO BE INFERRED FROM FACT of his loaning money of his principal and taking a note, a power of attorney to confess judgment, and a deed of trust as security; and the fact that he has received installments of interest from the debtor, and paid them to the creditor, is as much evidence that he was in this respect the agent of the debtor as of the creditor; and therefore the payment of the note to such person by the debtor is at his peril, and if the money is not paid to the holder of the note, equity will not enjoin the collection of a judgment confessed on the note. *Id.*
3. DEBTOR WHO PAYS MONEY TO PERSON NOT AUTHORIZED TO RECEIVE IT, and without inquiry into his authority, must bear the loss if such person appropriates the money to his own use. *Id.*

See ATTACHMENTS; INSURANCE, 5, 7, 8; NEGOTIABLE INSTRUMENTS, 30.

ALIENS.

1. ILLEGITIMATE CHILDREN WHO ARE ALIENS, born and residing abroad, and taking land in Maryland by devise from their father, a citizen of the United States domiciled abroad, are considered in law as purchasers, and take, not for their own benefit, but for the benefit of the state, and subject to seizure thereby. *Guyer v. Smith*, 650.
2. WHETHER ALIEN CAN MAINTAIN EJECTMENT for freehold lands in the state of Maryland, *quære*. *Id.*
3. ALIEN'S TITLE TO LAND IN MARYLAND is held, not for his own benefit, but for the benefit of the state, and subject to be divested thereby upon an inquest of office found, or other notorious act equivalent thereto. *Id.*

4. **GRANT OF ESCHERAT PATENT** by commissioners of the land-office of Maryland is a judicial act. The parties in interest having a right to appear, and by their caveat to contest its issue, with the right to appeal from the decision. *Id.*
5. **ESCHERAT PATENT ISSUED BY COMMISSIONER** of the land-office of Maryland, has the same effect as the ancient proceeding by office found, in divesting the title of an alien to freehold lands in such state. *Id.*
6. **ILLEGITIMATE CHILDREN UNDER MARYLAND LAW** are *nullius filii*, and therefore not entitled to the benefit of the provisions of the act of Congress declaring "that the children of persons who are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States." *Id.*

ALTERATION OF INSTRUMENTS.

1. **ALTERATION OF INSTRUMENTS.** — Plaintiff who produces in evidence a deed as a muniment of his title, which appears upon its face to have been altered in a particular material to his interests and to the prejudice of the defendant, must establish by satisfactory evidence that the alteration was made at the time the instrument was executed, or it will be given effect to as it read before the alteration was made. *Galland v. Jackman*, 172.
2. **EFFECT OF ALTERATION OF WRITTEN INSTRUMENT DEPENDS UPON ITS NATURE**, the person by whom and the intention with which it was made. *Vogle v. Ripper*, 298.
3. **ALTERATION OF WRITTEN INSTRUMENT MAY BE CONSIDERED AS IMMATERIAL**, if neither the rights or interests, duties or obligations, of either of the parties are in any manner changed. *Id.*
4. **ALTERATION OF INSTRUMENT BY STRANGER SHOULD NOT CANCEL DEBT** of which the instrument was merely evidence. *Id.*
5. **MATERIAL ALTERATION OF INSTRUMENT FRAUDULENTLY MADE BY ITS HOLDER** deprives the wrong-doer of all rights by virtue of it, and he cannot supply its place by other evidence. *Id.*
6. **MORTGAGE WHO FRAUDULENTLY ALTERS OR DESTROYS MORTGAGE NOTES** thereby releases and discharges the debt, and cannot sustain a bill to foreclose the mortgage which is a mere incident of the debt. *Id.*
7. **INTENTION WITH WHICH ALTERATION OF INSTRUMENT IS MADE IS MATERIAL FACT**; and if the alteration is not fraudulent, although the identity of the instrument may be destroyed, it will not operate to cancel the debt of which the instrument is merely evidence. *Id.*
8. **MATERIAL ALTERATION OF MORTGAGE NOTES, IF NOT FRAUDULENT**, will not operate as a discharge of the debt and mortgage. *Id.*

ASSIGNMENTS.

- PARTY CANNOT BECOME ASSIGNEE OF HIS OWN OBLIGATION**, and when an obligation is transferred to an obligor by an instrument in the form of an assignment, instead of taking effect as such it operates as an extinction of the obligor's liability. *Brown v. Metz*, 277.

See JUDGMENTS, 1, 2, 6-8.

ATTACHMENTS.

1. **SHERIFF CANNOT BE CHARGED ON GARNISHEE PROCESS** in respect to any money or property held by him in virtue of authority derived from law. *Lightner v. Steinagel*, 292.

2. **OFFICER HOLDING MONEY MERELY AS AGENT OF LAW** is not subject to garnishee process. But if anything arises to change this relation from an official to a personal obligation, he then becomes amenable to such process. *Id.*
3. **MONEY IN HANDS OF SHERIFF**, paid him on the redemption of lands sold on execution, cannot be attached as the property of the plaintiff in the execution. But a surplus remaining in the hands of the sheriff after satisfying plaintiff's execution is liable to the garnishee process. *Id.*

See PARTNERSHIP, 2.

ATTORNEY AND CLIENT.

1. **MANNER, TERMS, AND CONDITIONS OF ATTORNEY'S ADMISSION TO PRACTICE**, and of his continuing in practice, as well as his powers, duties, and privileges, are proper subjects of legislative control, to the same extent and subject to the same limitations as any other profession or business that is created or regulated by statute. *Ex parte Yale*, 62.
2. **LEGISLATURE MAY REQUIRE AS CONDITION PRECEDENT TO ATTORNEY'S ADMISSION TO PRACTICE**, or to his continuance in practice, the taking of the oath prescribed in the act "to exclude traitors and alien enemies from the courts of justice in civil cases." *Id.*
3. **CREDITOR IS ENTITLED TO SELECT HIS OWN ATTORNEY, AND TENDER OF SERVICES OF ATTORNEY** is not equivalent to furnishing money to pay the expense of procuring one, under a decree obtained at the suit of a surety, and requiring the creditor to sue the principal, on the surety tendering the creditor a sufficient amount to pay reasonable costs and expenses in the action. *Dane v. Corduan*, 53.
4. **PARTY IS NOT CHARGEABLE WITH NOTICE OF FACTS WITHIN KNOWLEDGE OF HIS ATTORNEY**, where the latter acquired knowledge thereof while acting as the attorney of another party. *McCormick v. Wheeler*, 388.

See EVIDENCE, 15; MALICIOUS PROSECUTION, 5; OFFICE AND OFFICERS, 3.

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See EVIDENCE, 12.

ABDUCTION.

1. **ONE WHO ABDUCTS MINOR CHILD IS LIABLE TO FATHER TO EXTENT OF HIS ACTUAL INJURIES** sustained thereby, including reasonable and proper expenditures incurred in the attempt to regain the possession of the child. *Rice v. Nickerson*, 777.
2. **WHERE FATHER, IN ACTION FOR ABDUCTION OF HIS MINOR CHILD, DISAVOWS ALL CLAIM FOR AGGRAVATION** of damages for any malice on the part of the defendant, and rests his claim for damages solely on the ground that he had the rightful custody of the child, and that the defendant illegally removed him, in violation of his rights, evidence is not admissible, on the part of the defendant, to show that he took the child at the request of his mother, who had previously obtained a decree of divorce in another state awarding to her the custody of the child; or that, on the hearing in another proceeding, the child was examined separately and apart by the presiding judge, and then expressed a strong desire to go with his mother and remain with her. *Id.*

ACCORD AND SATISFACTION.

1. **TAKING NOTE OF DEBTOR, OR OF THIRD PERSON, FOR PRE-EXISTING DEBT IS NO PAYMENT**, unless it be expressly agreed to take the note in payment, and run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches in not presenting it for payment in due time. It simply postpones payment of the old debt until a default is made in the payment of the note. *Mitchell v. Hockett*, 151.
2. **AGREEMENT TO ACCEPT NOTES IN SATISFACTION OF JUDGMENT AND EXECUTION, HOW PROVED.**—The plaintiff in an execution may, by express agreement, but not otherwise, accept promissory notes as an absolute payment of the judgment and execution. The sheriff's certificate is not, however, proof of such agreement. It must be proved by other evidence. *Id.*
3. **EVIDENCE OF SATISFACTION OF EXECUTION.**—Sheriff's return, indorsed on an execution that it is satisfied by promissory notes received for the amount due on it, is not evidence of the satisfaction of the judgment on which it issued, and cannot be admitted in evidence as tending to prove a satisfaction of the same. *Id.*

See MORTGAGES, 6.

BAILEMENTS.

See WAREHOUSEMEN.

BANKS AND BANKING.

1. **WHERE TWO BANKS KEEP RUNNING ACCOUNTS WITH EACH OTHER, and one of them, holding drafts of the other for collection, fails to pay over money received thereon, the remedy is against the defaulting bank, and not against the drawer of the draft.** *Kupfer v. Bank of Galena*, 309.
2. **WHERE ONE FORWARDS GRAIN TO ANOTHER, AND DRAWS ON HIM IN FAVOR OF BANK** which advances money on the draft, the transaction cannot be regarded as a sale of the grain to the bank, so as to divest it of its remedy against the drawer if the drawee fails to pay the draft, or to oblige it to account for the value of the grain in a suit against the drawer. *Id.*
3. **DEPOSITOR IN BANK WAS ENTITLED TO RECEIVE GOLD COIN** in return for gold coin deposited, or its equivalent in currency at its market value at the time it was drawn out, before the passage of the legal-tender laws. *Id.*
4. **PROTEST OF PAYMENT OF STOLEN BANK BILLS** is not evidence that the bills were stolen, and constitutes no objection to a recovery if they were not stolen. It is, however, evidence that the bank claimed that they were stolen and admissible upon the question of *bona fides*. *Olmstead v. Winsted Bank*, 260.
5. **PURCHASE OF STOLEN BANK BILLS AT DISCOUNT** does not constitute an objection to a recovery thereon. But an offer to sell the bills at less than the market price of the genuine bills is a fact admissible on the question of good faith. *Id.*
6. **HOLDER OF STOLEN BANK BILLS** who came by them in good faith for a valuable consideration, and in the regular course of business, can recover upon them against the bank. *Id.*
7. **BONA FIDE HOLDER OF STOLEN BANK BILLS**, received in the regular course of business and for a valuable consideration, does not acquire an

absolute property therein which he can transmit to a purchaser who has knowledge that the bills were stolen, or were claimed to have been stolen from and not issued by the bank. *Id.*

See NEGOTIABLE INSTRUMENTS.

BILLS OF LADING.

See SHIPPING.

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See CORPORATIONS, 2, 9; EXECUTORS AND ADMINISTRATORS, 2-6; OFFICER AND OFFICERS, 5-8; SURETSHIP.

BOUNDARIES.

1. RIVER AS BOUNDARY LINE. — Where a river is named as a boundary line of a tract of land, the boundary line follows the meanderings of the stream. When a line is to run up or down a stream not navigable a given distance, the meanderings of the stream are to be followed until the required distance, when reduced to a straight line, is attained. And where courses are not specified, the other lines are to be run in such a manner that the land shall be in a form as nearly rectangular as possible. *Hicks v. Coleman*, 103.
2. SURVEY OF LAND BOUNDED ON STREAM, QUANTITY OF LAND AND LENGTH OF LINE ON STREAM BEING GIVEN, the meanderings of the stream are to be followed until, reduced to a straight line, the same will be of the required length. From the ends of this line other lines are to be projected at right angles with it, far enough so that a line drawn between the two, parallel with the straight line, will leave the required quantity between it and the stream. *Id.*
3. SAME. — QUANTITY BEING GIVEN, WITHOUT SPECIFYING LENGTH OF LINE ON STREAM, the required quantity of land is to be located by making the first line follow the meanderings of the stream from the starting-point named in the deed until, reduced to a straight line, it shall be of sufficient length to form one side of a square large enough to contain the required quantity; and this square is to be formed by projecting straight lines at right angles from the ends of the first straight line to such a distance that a line drawn from one to the other, parallel with such first line, will include the required quantity between it and the stream. *Id.*
4. SAME. — WHERE LINE OPPOSITE RIVER IS, BY EXPRESS TERMS OF DEED, TO RUN "PARALLEL WITH RIVER," it means parallel with the river in all its meanderings, and not parallel with its general course. *Id.*
5. DECLARATION AS TO BOUNDARY IS ADMISSIBLE IN EVIDENCE AFTER DECEASE OF ONE WHO MADE IT, WHEN. — Where one in actual occupation of land, under undisputed claim of title, pointed out the limits of his claim, his declaration as to such boundary made at that time is admissible in evidence after his decease, in favor of those who claim under him, on the trial of a question arising subsequently concerning the boundary line of the same tract of land. *Wood v. Foster*, 681.

BY-LAWS.

See CORPORATIONS, 4.

CHATTEL MORTGAGES.
See STATUTE OF FRAUDS, 5, 6.

CHECKS.
See NEGOTIABLE INSTRUMENTS, 5.

CITIZENSHIP.
See ALIENS.

COLLATERAL SECURITY.

TAKING OF COLLATERAL SECURITY FOR PAYMENT OF DEBT AFFORDS NO IMPLICATION THAT CREDITOR IS TO LOOK TO IT ONLY or primarily for the payment of the debt. The debtor's obligation to respond in his person and property is the same as if no security had been given. *Boysse v. Ward*, 710.

COLOR OF TITLE.

1. **COLOR OF TITLE IS PRESUMED TO HAVE BEEN ACQUIRED IN GOOD FAITH, till it is shown to have been acquired otherwise. *McCagg v. Hancock*, 327.**
2. **GOOD FAITH, REQUIRED BY STATUTE, IN ORATION OR ACQUISITION OF COLOR OF TITLE, is a freedom from a design to defraud the person having the better title. *Id.***
3. **KNOWLEDGE OF ADVERSE CLAIM TO OR LIEN UPON PROPERTY does not, of itself, indicate bad faith in a purchaser, and is not evidence of it, unless accompanied by some improper means to defeat such claim or lien. *Id.***
4. **INSTRUMENT INDICATING INTENTION TO PASS FROM ONE PARTY TO ANOTHER TITLE TO LANDS of which a description is given, gives color of title to the lands described. *Id.***
5. **COLOR OF TITLE, WHAT IS. — One who goes upon a tract of land where there is no adverse possession, a portion of which is uninclosed, and claims the whole under a deed describing the entire tract, holds under color of title, and will prevail, in an action to recover the land, as against one who enters subsequently upon the uninclosed part of the tract. *Hicks v. Coleman*, 103.**

See ADVERSE POSSESSION, 2; MORTGAGES, 6.

COMMON CARRIERS.

1. **LIABILITIES OF COMMON CARRIERS AND FORWARDERS, independent of any express stipulation in the contract, are entirely different. *Hooper v. Wells, Fargo, & Co.*, 211.**
2. **COMMON CARRIER IS INSURER OF PROPERTY TRUSTED TO HIM against all events except the act of God or public enemies. *Id.***
3. **COMMON CARRIERS ARE HELD BY LAW TO PECULIAR RESPONSIBILITY, admitting no excuse for the loss of goods, except an act of God, or of a public enemy, which could not have been averted. *Bland v. Adams Express Co.*, 623.**
4. **MORGAN AND HIS BAND OF CONFEDERATES CONSTITUTED, IN MAY, 1862, PUBLIC ENEMIES, in the technical sense, and the defendant was not liable for a package of money taken by them from a railroad train. *Id.***

5. **FORWARDERS ARE NOT INSURERS.** — Their liability is like that of warehousemen and common agents, and is governed by the general rule applicable to other bailees for hire not subject to extraordinary liabilities. They are responsible for all injuries to property, while in their charge, resulting from negligence, or misfeasance of themselves, their agents, or employees. *Hooper v. Wells, Fargo, & Co.*, 211.
6. **RESTRICTIONS UPON COMMON-LAW LIABILITY OF COMMON CARRIER**, for goods intrusted to him for transportation, are to be construed most strongly against the common carrier, especially where they have been inserted in a receipt drawn up by himself for his own benefit, and signed by him alone. *Id.*
7. **EXCEPTIONS TO CARRIER'S COMMON-LAW LIABILITY ARE TOO STRICTLY INTERPRETED**, and it is the carrier's duty to bring his case strictly within them. *Id.*
8. **EXPRESS COMPANY'S RECEIPT, CONSTRUCTION OF.** — The receipt of an express company for goods intrusted to it for transportation for hire, and which restricts the liability of the company, will not be construed as exempting the company from liability for loss occasioned by negligence in the agencies it employs, unless the intention to thus exonerate the company is expressed in the instrument in plain and unequivocal terms. *Id.*
9. **FORWARDERS ARE LIABLE FOR NEGLIGENCE OF MANAGERS OF VARIOUS PUBLIC CONVEYANCES**, such as stages, steam-tugs, lighters, and ocean steamers employed by them for delivering goods. Such managers are the agents and employees of the forwarders; and an express company making itself liable only "as forwarders" is subject to the same liability. *Id.*
10. **EFFECT OF RESTRICTIVE CLAUSE IN EXPRESS COMPANY'S RECEIPT**, signed by it alone and given to the shipper, stating that the company is "not to be responsible except as forwarder," where it undertakes to transport ballion for hire, from one place to another, "and deliver to address," is not to exempt it from liability for loss occasioned by the carelessness or negligence of the employees on a steamboat owned and controlled by other parties than the company, but ordinarily used by it, as a means of conveyance, in its business as carrier. The managers and employees of the boat are in such a case the agents of the express company. *Id.*
11. **MERE PURCHASE OF RAILROAD TICKET DOES NOT MAKE PASSENGER OR BUYER**; but if he is passing from the office or place of business where the purchase was made to the train, to take his seat in the cars, on the premises belonging to the company, connected with the railroad, and under the direction of the company's agent, and given to him as a passenger with whom the company have made the contract for conveyance, which the purchase of the ticket creates, he is to be considered as a passenger, and entitled to the rights of a passenger while so passing. *Warren v. Fitchburg R. R. Co.*, 700.
12. **PURCHASERS OF TICKETS ARE BOUND TO COMPLY WITH ALL REASONABLE RULES AND ORDERS OF RAILROAD COMPANY** or their agents, as much when going to the cars from the station-house, or from the cars to a place of safety beyond the railroad track, as they are when actually on board the train, and while the transit continues. *Id.*
13. **CARE IMPOSED UPON CARRIERS OF PASSENGERS FOR HIRE.** — A railway company is bound to use the utmost care and diligence in providing for passengers a safe and convenient way and manner of access to its trains, and in preventing the interposition of any obstacle or obstruction which

would unreasonably impede them or expose them to harm while proceeding to take their seats in the cars, in order to prevent those injuries which human care and foresight can guard against. *Id.*

See NEGLIGENCE; PUBLIC POLICY; RAILROADS; SHIPPING.

COMMONS.

See FISHERY.

CONFLICT OF LAWS.

LEX LOCI CONTRACTUS AT TIME CONTRACT WAS MADE DETERMINES WHAT CONTRACT WAS, and the *lex fori* at the time the enforcement is sought prescribes the remedy. Thus, after execution and levy in an action in Kansas, on a note made in Missouri, a sale for less than two thirds of the appraised value of the property is void, if by the law of Kansas it is so provided, though by the law of Missouri it is not so provided. *Hefner v. Stensinderfer*, 593.

CONSTITUTIONAL LAW.

1. **CONTEMPORANEOUS CONSTRUCTION OF CONSTITUTION**, of long duration, continually practiced, under and through which many rights have been acquired, ought not to be shaken but upon the ground of manifest error and cogent necessity. *Harrison v. State*, 658.
2. **GOVERNOR OF STATE BEARS SAME RELATION TO STATE** that the President does to the United States, and in the discharge of his political duties is entitled to the same immunities, privileges, and exemptions. *Miles v. Bradford*, 643.
3. **JUDICIARY HAVE NO CONTROL OR REVISORY POWER** over questions which it is the duty and within the power of the governor of the state to decide, and from which there is no appeal. *Id.*

See MARRIAGE AND DIVORCE, 1-3; STATUTES.

CONTINUANCE.

See PLEADING AND PRACTICE, 2-3.

CONTRACTS.

1. **OFFER OF REWARD BY PUBLIC ADVERTISEMENT** is to be regarded as a conditional promise. Whoever would entitle himself to the reward must prove that he has performed substantially the service proposed in the advertisement, though it need not be performed literally. *Bess v. Dyer*, 747.
2. **ONE WHO GIVES TO OWNERS OF STOLEN PROPERTY, WHO HAVE OFFERED REWARD** for its recovery and the detection of the thief, information by which, with reasonable diligence on their part, they are enabled to recover the property and detect the thief, is entitled to the reward, although he does nothing further to aid in the recovery of the property and the conviction of the thief. *Id.*
3. **AGREEMENT BY MEMBERS OF ASSOCIATION IS ILLEGAL AND VOID**, the terms of which are, that no one should carry freight for less than the rate fixed by the association, without regard to the question whether the rate was reasonable or not. *Sayre v. Louisville Bone Ass'n*, 612.

See CONFLICT OF LAWS; CORPORATIONS, 6; PUBLIC POLICY; STATUTES ON FRAUDS; STATUTE OF LIMITATIONS, 5, 6.

CONVERSION.

BUYING HORSE FROM ONE WHO HAD NO RIGHT TO SELL HIM, and subsequently exercising dominion over him by letting him to another person, amount to a conversion, although the buyer believed his title to the horse to be perfect; and no demand by the owner is necessary before commencing an action for the conversion. *Gilmere v. Newton*, 749.

CORPORATIONS.

1. **GENERAL LAW CONCERNING PERSONS MAY INCLUDE ARTIFICIAL** as well as natural persons, and every corporation is a legal person. *City of Louisville v. Commonwealth*, 624.
2. **PRIVATE CORPORATION, LIKE BANK OR RAILROAD COMPANY, IS, IN TECHNICAL SENSE, PERSONAL**; but a municipal corporation, like a state, county, or city, while nominally a person, is virtually a political power. *Id.*
3. **CORPORATION, PUBLIC OR PRIVATE, POSSESSES AND CAN EXERCISE NO POWERS** than those specifically conferred by the act creating it, or such as are incidental or necessary to carry into effect the purposes for which it was created. *Caldwell v. City of Alton*, 282.
4. **POWER OF CORPORATION TO MAKE BY-LAWS IS LIMITED BY NATURE OF CORPORATION**, and the laws of the country. It can make no rule contrary to law, good morals, or public policy. *Saunders v. Louisville Bank Ass'n*, 613.
5. **MAJORITY OF BARE QUORUM OF BOARD OF DIRECTORS MAY BIND CORPORATION**. *Buell v. Buckingham*, 516.
6. **DIRECTORS MAY MAKE VALID SALE OF REAL ESTATE OF CORPORATION** under a general power to make contracts. *Id.*
7. **IN ACTION AGAINST CORPORATION FOR DAMAGES RESULTING FROM ITS NEGLIGENT ACT**, evidence tending to show that the persons who committed the wrong were not the agents or employees of the corporation is relevant and material. *Ohio & Miss. R. R. Co. v. Davis*, 477.
8. **MUNICIPAL CORPORATION CANNOT, WITHOUT SPECIAL AUTHORITY, SUBSCRIBE FOR STOCK IN RAILROAD CORPORATION**, and issue bonds in payment thereof; but such authority may be conferred by statute whenever it is expedient; and when so given in any case, it must be executed as prescribed in the grant, if executed at all; and the terms of the grant cannot be legally departed from or exceeded. *City of Aurora v. West*, 413.
9. **PERSONS DEALING WITH BONDS ISSUED BY MUNICIPAL CORPORATION IN AID OF RAILROAD**, which bear on their face a reference to the authority under which they are issued, are bound to take notice of the extent of the powers of the agent who issued them. *Id.*
10. **LEVY BY COUNSEL OF MUNICIPAL CORPORATION OF TAX FOR PAYMENT OF JUST DEBTS**, at a rate not exceeding the maximum limit of its power of taxation, is not discretionary, so that they may refuse to levy such tax for the payment of a judgment duly rendered, upon which execution has been issued and returned *nulla bona*, but is a duty, the discharge of which may be enforced by *mandamus*. *Coy v. City Council of Lyons*, 539.
11. **CREDITOR OF MUNICIPAL CORPORATION ACQUIRES PRIORITY OVER SIMPLE CONTRACT CREDITORS**, by demanding payment, and upon refusal thereof, instituting proceedings by *mandamus* to compel the levy of a tax for the payment of his debt; and tax so assessed should be set aside as a special fund for the payment of such debt. *Id.*
12. **IF SINGLE LEVY OF TAX TO PAY OFF JUDGMENT** will not raise a sufficient fund therefor, by reason of the limitation on the power of the city

council to tax beyond a certain rate, it is competent for a court, on *mandamus*, to order that additional levies be made from year to year until the entire indebtedness is discharged. *Id.*

12. ORDER OF COURT THAT MUNICIPAL CORPORATION SHOULD LEVY TAX at certain rate not exceeding the limit of its power of taxation to pay off a judgment, without having before it *data* of the taxable property of the corporation, if erroneous in fixing a rate which would produce a larger sum than would be necessary to discharge the debt, would be merely error without prejudice to the corporation, and a levy of a less rate and satisfaction of the judgment would be a substantial compliance with the *mandamus*. *Id.*
14. SIMPLE CONTRACT DEBT CANNOT BE MADE BASIS OF AFFIDAVIT FOR *MANDAMUS* to compel the levy of a tax by a municipal corporation for its payment while it retains its form as a simple debt, unless it was contracted under a law or vote authorizing such proceeding to enforce its payment. *Id.*
15. IT IS DUTY OF AUTHORITIES OF MUNICIPAL CORPORATION TO LEVY AND COLLECT TAX within the limit of the power to levy taxes, sufficient for the payment of a debt which has been reduced to judgment, and which can be paid in no other way, and such tax should be set apart and applied to such purpose only. *Id.*
16. CITY AUTHORITIES MAY ADOPT SUCH REGULATIONS in regard to market within its limits as have reference to the preservation of peace and good order and the health of the city. They should be of a police and sanitary character, and an attempt by color of regulation to restrain trade is an abuse of power. *Caldwell v. City of Alton*, 282.
17. WHERE LIMITS OF MARKET ARE SPECIALLY DEFINED in an ordinance, and embrace but a portion of a city, the regulations prescribed for it can only operate within those limits. They cannot under this power be made to extend throughout the city. *Id.*
18. WHERE MARKET IS ESTABLISHED BY ORDINANCE and its limits defined, the power of the city council to prescribe regulations for its operation within those limits is plenary. But under such power the regulations cannot be made to embrace the whole city. *Id.*
19. POWER TO RESTRAIN HAWKERS AND PEDDLERS from using the streets of a city for purposes of traffic has nothing to do with the power to regulate a market occupying but a small portion of such city. The former may be regulated under the power to prevent nuisances. *Id.*
20. CITY CANNOT BY ORDINANCE, UNDER PRETEXT of regulating a market, restrain a regular merchant from selling his goods or carrying on his lawful trade in the city during a portion of each day, outside the market limits; such a regulation would be in restraint of trade, unreasonable, unjust, and void. *Id.*
21. CITY MAY BY ORDINANCE, when given power by its charter, prevent the keeping on hand for sale decaying vegetables. *Id.*

See HIGHWAYS; RAILROADS.

COSTS.

See EXECUTORS AND ADMINISTRATORS, 2.

COURTS.

See JUDGMENTS, 15-22; RECORDS.

COVENANTS.

See DEEDS, 8-13; EJECTMENTS, 10; VENDOR AND VENUEE.

CRIMINAL LAW.

1. EMPLOYEE OF MERCANTILE HOUSE IS NOT GUILTY OF EMBEZZLEMENT where, having charge of the money of the concern, and being about to leave their employment, takes money of the firm in his hands equal to the amount due him as the balance of his salary, without the knowledge and against the wish of his employers, and charges the same to himself on their books. *Ross v. Innis*, 373.
2. HOMICIDE, TO BE JUSTIFIABLE, must be in necessary self-defense, or in defense of habitation, person, or property, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or who manifestly intends and endeavors, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. *People v. Batchelder*, 231.
3. BARE FEAR OF OFFENSES WHICH WILL JUSTIFY HOMICIDE is not enough to justify a killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge. *Id.*
4. IF ONE PERSON KILL ANOTHER IN SELF-DEFENSE, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary, and that the person killed was the assailant; or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given. *Id.*
5. JUSTIFIABLE HOMICIDE. — Where several persons are on an island, a part of the public domain, engaged in gathering the eggs of wild birds deposited there, and others attempt to land there to engage in the same pursuit, and their attempt to land is forcibly resisted by the party first on the island, the party seeking to land are justified in using the necessary force to effect their object; and if one of the shore party is killed, in doing this, by the party attempting to land, it will be justifiable homicide. *Id.*
6. SAME — EFFECT OF KILLING PARTY BEARING ARMS. — Where several persons are on an island, a part of the public domain, engaged in gathering the eggs of wild birds deposited there, and other persons attempt to land there to engage in the same pursuit, the fact that the party attempting to land are armed with guns does not affect their right to land; and if they are attacked by those on shore with deadly weapons and murderous intent, and their lives placed in danger, they are not obliged to retreat, but may stand their ground, and if need be kill their assailants. *Id.*
7. ON TRIAL FOR MURDER, REJECTION OF EVIDENCE OFFERED BY DEFENDANT of the comparative strength of the deceased, is not error justifying reversal, where it is admitted by the prosecution in open court that the deceased was a much stronger man than the defendant. *Wise v. State of Kansas*, 595.
8. ON TRIAL FOR MURDER, COMPARATIVE STRENGTH OF DECEASED AND DEFENDANT is better proved by facts in detail of what occurred at the

time of the homicide, as the grapple, scuffle, and the like, than by the opinion of the witness. *Id.*

9. ON TRIAL FOR MURDER, EVIDENCE OF CHARACTER AND HABITS OF DEFENDANT, as that he was well known by defendant and others to be quarrelsome and savage, is inadmissible, unless at least the circumstances of the case raise a doubt as to whether the defendant acted in self-defense, and then it may be sometimes admitted to show that the defendant was justified in believing himself in danger. *Id.*
10. PERSON WAS NOT JUSTIFIED IN CONSIDERING HIMSELF IN DANGER so as to authorize him to kill his assailant, where it appears that the parties were eight or nine paces apart at the time of the fatal shooting, the former with a loaded double-barrel shot-gun, and deceased with a knife; and that deceased had stopped before defendant shot him. *Id.*
11. PERJURY MAY BE COMMITTED BY SWEARING FALSELY TO COLLATERAL ISSUE BEFORE COURT. It is not essential that the fact sworn to should be material to the main issue in the case. *State v. Skaye*, 495.
12. INDICTMENT UNDER MARYLAND CODE must show on its face all facts necessary to constitute the offense charged. In this particular, it must be explicit and certain, and leave nothing to inference. A judgment overruling a demurrer to an indictment defective in this particular, will be reversed. *Phelps v. State*, 654.
13. IN CRIMINAL CASE, COURT PROPERLY REFUSED TO CHARGE JURY that "defendant is entitled to the benefit of every reasonable doubt upon every material fact involved in the case," and properly instructed the jury instead, that "the defendant is entitled to the benefit of every reasonable doubt of his guilt, remaining in the minds of the jury, after canvassing the whole of the testimony in the case." *Wise v. State of Kansas*, 595.
14. INDICTMENT SUFFICIENTLY SHOWS THAT IT WAS FOUND BY GRAND JURY of Chase County, in which court was held, under a statute requiring the indictment to show that it was found by the grand jury of the county in which the court is held, where it reads: "State of Kansas, Chase County, ss.: In the district court of the fifth judicial district sitting in Chase County, April term, A. D. 1863. The jurors of the grand jury of the state of Kansas, duly drawn, impaneled, charged, and sworn to inquire of offenses committed within the body of the county of Chase, and within the county of Marion attached to said county of Chase, for judicial purposes," etc. *Id.*
15. FELONIES ARE OFFENSES AGAINST STATE, and prosecuted and punished by and in the name of the state, by a grand jury organized in each county, pursuant to state laws to inquire in its behalf, as to infractions of its laws in each county. *Id.*
16. WHERE IN INDICTMENT ONE DESCRIPTION OF WOUNDS IS DEFECTIVE, but the indictment still contains a certain and explicit description of the wound that caused death, the defective description may be treated as surplusage or disregarded, under the Kansas statute. *Id.*

See EVIDENCE, 1.

CUSTOMS.

See MINES AND MINING, 4, 5.

DAMAGES.

2. LAW INFERS DAMAGE FROM EVERY INFRINGEMENT OF RIGHT. *McConnell v. Kibbe*, 265.

2. **FOR INVASION OF PROPERTY RIGHT**, nominal damages may be recovered; but such recovery is no bar to a suit for actual damages subsequently sustained, where they did not take place before the commencement of the former suit. *Id.*
 3. **SUCCESSIVE SUITS MAY BE BROUGHT FOR ACTUAL DAMAGES**, from time to time, as the damages are sustained, and in each suit the party may recover such damages as he has sustained prior to its commencement, not barred by a previous recovery. *Id.*
 4. **VERDICT SHOULD NOT BE DISTURBED ON GROUND OF EXCESSIVE DAMAGES**, in cases of tort, unless it be probable, from the amount of the damages assessed, that the jury has acted under the influence of prejudice or passion. *Ross & Co. v. Innis*, 373.
 5. **ALLEGATION OF SPECIAL DAMAGES** as matter of aggravation is a substantive allegation of fact, and not an inference of law, resulting from facts antecedently stated. *McConnell v. Kibbe*, 265.
 6. **DECLARATION IN CASE FOR NOMINAL DAMAGES** for infringement of a right, and for actual damages subsequently sustained, alleged as matter of aggravation, need not allege when the damages were sustained, and thereunder plaintiff may prove and recover any damages sufficiently described, which he has sustained prior to commencement of suit. But a recovery by him is a bar to a recovery in a subsequent suit of any damages sustained prior to the commencement of the former one. *Id.*
 7. **IN ACTION FOR ORIGINAL WRONG**, not in itself actionable, but alleged with continuing injury, and a prayer for special and subsequent damages, the plea of the statute of limitations is not good in bar, for the reason that the action is not for the wrongful act, but solely for the consequences of it. *Id.*
 8. **WHERE ORIGINAL ACT IS OF ITSELF ACTIONABLE**, and an action is brought solely for the wrongful act, the statute of limitations is a good plea in bar, and a complete answer to the complaint. *Id.*
 9. **IN ACTION FOR ORIGINAL WRONGFUL ACT**, and for subsequent damages alleged as matter of aggravation, the plea of the statute of limitations is good in bar, and a complete answer to the original wrongful act, as defendant is not required, in the first instance, to answer the matter in aggravation. In such case, if plaintiff desires to take advantage of such matter, he must now assign for it, and a replication that the causes of action accrued within such statutory period is not a new assignment, but after issue joined thereon should be treated as such. *Id.*
 10. **FOR INJURY TO PROPERTY**, committed while a tenant has a leasehold interest therein, he may maintain an action for such portion of the damages as he has sustained, and the owner may maintain his action for such portion of them as he sustained as owner of the reversion. But the tenant cannot recover for an injury committed before he leased the premises. *Id.*
 11. **IN ACTION BY OWNER FOR DAMAGES SUSTAINED** while property was leased to another party, he is not entitled to recover, if it appears that the injury was committed before the property was leased, and while he was owner in fee. *Id.*
- See ELECTIONS; FORCIBLE ENTRY AND DETAINER; HIGHWAYS, 12; NEGLIGENCE, 4-7; PLEADING AND PRACTICE, 15; SHIPPING.**

DEEDS.

1. **WHERE DEED COMPLETE IN FORM WITH EXCEPTION OF NAME OF GRANTEE** is signed and sealed, the subsequent insertion of the name of a grantee,

and the change of a qualified covenant into an absolute one by the parcel authority of the grantor, but in his absence, will render the deed invalid as to him, and no action will lie against him upon any covenants in it; and it is immaterial that the alterations are made by a co-grantor, and that a description of the occupation of the contemplated grantee had been inserted in the deed when it was signed and sealed. *Bagford v. Pearson*, 764.

2. WHERE TERMS OF DEED ARE PLAIN AND UNAMBIGUOUS, court should limit its inquiry to what the words of the deed express, without regard to any intention independent of the words. *Donahue v. McNulty*, 78.
3. RECITALS IN RECENT DEED AS EVIDENCE WHERE BOTH PARTIES ARE DEAD. — Although both grantor and grantee in recent deed are dead, its recitals as to ownership and boundaries of land adjoining that which is conveyed therein are not admissible in evidence against one who has subsequently become the owner of the granted premises, and who claims a right of way over the adjoining land, as appurtenant to other land held by him under a prior deed from the same grantor. *Pettingill v. Porter*, 671.
4. RECITAL OF CONSIDERATION NOT CONCLUSIVE. — Recital of payment of valuable consideration in a deed to plaintiff who claims as innocent purchaser without notice of a prior deed to defendant, does not prove such consideration as between plaintiff and defendant. Such recitals are not evidence against strangers, nor against one claiming under the party executing the reciting deed by title prior thereto, or adversely to him, but only against those claiming under him by title subsequent. *Galland v. Jackman*, 172.
5. AFTER GRANTOR HAS ONCE PARTED WITH ALL HIS INTEREST IN LAND TO ONE, BY DEED, he can make no admission by deed or otherwise that would be binding on his first grantee. *Id.*
6. NOTICE OF PRIOR UNRECORDED DEED. — When a subsequent purchaser whose deed is recorded had notice at the time of his purchase of some kind of a prior conveyance from his grantor, even if he did not know what kind of a conveyance it was, whether of an estate for years or in fee-simple, he cannot claim as an innocent purchaser. *Id.*
7. WHERE NAME OF PRIOR GRANTOR AND SUBSEQUENT GRANTEE of land is the same in the conveyances, he will be presumed to be the same person. *Brown v. Metz*, 277.
8. GENERAL COVENANT OF WARRANTY PASSES with the seisin of the land. *Id.*
9. WHERE GRANTOR BEFORE ANY BREACH OF COVENANT OF WARRANTY contained in his deed becomes reinvested with the seisin which he conveyed, the covenant is extinguished. The estate granted by him ceased upon the reconveyance, and the covenant attendant upon the estate, and only co-extensive with it, was extinguished when the estate ceased. *Id.*
10. WHEN WARRANTOR TAKES BACK ESTATE as large as that which he had made, the warranty is defeated. He cannot warrant land to himself, nor be an assignee of himself. *Id.*
11. PARTY SEIZED OF ESTATE CONVEYED has power to release a covenantor or warrantor from his liability before the covenant or warranty is broken. *Id.*
12. WHERE COVENANT OR WARRANTY RUNS WITH LAND until a breach, a reconveyance of the land before that time to the covenantor or war-

grantor transfers to him the covenant or warranty without liability upon it to any one. *Id.*

13. WHERE GRANTOR HAS CONVEYED LAND with covenant of warranty, a reconveyance to him does not revive the obligation. The latter conveyance is made either with or without covenant or warranty, at the will of the grantor, and there is no liability resting upon him unless there are new covenants or warranty, whereby he enters into new obligations. *Id.*
 14. DEED REFERRING TO ANOTHER FOR DESCRIPTION, ADMISSIBILITY OF, IN EVIDENCE. — Where a deed, containing no description of the land conveyed, except by reference to another deed, is properly admitted in evidence, the one referred to should also be received for the purpose of showing a description of the land conveyed, whether it be a genuine conveyance or not. No proof of its genuineness need be made, or that there was any such person as the one purporting to have executed it, or that he had any title to the land described therein. *Hicks v. Coleman*, 103.
 15. COPY OF DEED, CERTIFIED OR AUTHENTICATED ACCORDING TO STATUTE, IS ADMISSIBLE IN EVIDENCE under the act of 1857, where the original is lost or not under the control of the party offering the copy. *Id.*
 16. INDIANA STATUTE PRESCRIBING DEGREE OF CREDIBILITY TO BE ATTACHED TO AUDITOR'S DEED of land sold for taxes, and its recitals, does not preclude the introduction of evidence to show non-compliance with positive statutory requirements in reference to the steps necessary to vest in him the power to sell. *Wilson v. Lemon*, 471.
- See ALTERATION OF INSTRUMENTS; EXEMPTIONS, 17-21; HOMESTEADS, 8-12; MARRIED WOMEN, 1, 2; POWERS, 5; TAXATION, 3, 12, 13; TRUSTS, 3-5; VENDOR AND VENDEE.

DIVORCE.

See MARRIAGE AND DIVORCE.

DOWER.

1. PAYMENT OF MORTGAGE BY GRANTEE AND TAKING ASSIGNMENT TO HIMSELF IS NO DISCHARGE. — Where land has been conveyed by a deed of warranty, subject to a mortgage, and the grantee pays off the mortgage and takes an assignment thereof to himself, the mortgage is not thereby discharged, nor can the widow of the grantor maintain a writ of dower against him. *Strong v. Converse*, 732.
2. WIDOW OF GRANTOR IS NOT ENTITLED TO DOWER, AS AGAINST MORTGAGEE and those claiming under him, in her husband's land conveyed by a deed of warranty, subject to a mortgage covering the entire value of the property, so long as the mortgage remains undischarged. *Id.*

EASEMENTS.

See SERVITUDES.

EJECTMENT.

1. JUDGMENT IN EJECTMENT CONCLUSIVE. — Judgment in an action to recover real estate in California is conclusive and final as to the parties and privies in such action upon all facts put in issue and determined therein, and concludes them in any subsequent action in which such facts arise. *Coperton v. Schmidt*, 187.
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2. DEFENDANT IN EJECTMENT WHO DESIRES TO SET OFF VALUE OF HIS IMPROVEMENTS AGAINST MISSE PROFITS must assert his right by proper averments in his answer or he will be precluded from doing so at the trial. *Moss v. Shear*, 94.
3. SETTING OFF VALUE OF IMPROVEMENTS AGAINST MISSE PROFITS IN EJECTMENT CONSTITUTES COUNTERCLAIM OR SET-OFF, which, to be available as a defense, must, like any other new matter, be pleaded. *Id.*
See ALIENS, 2; GROWING CROPS, 3.

ELECTIONS.

STATEMENT OF FACTS HELD SUFFICIENT TO SUBJECT JUDGE OF ELECTION TO ACTION, for damages, for unlawfully refusing to receive the vote of a qualified voter. *Christman v. Bruce*, 803.

EMBEZZLEMENT.

See CRIMINAL LAW, 1.

EQUITY.

1. EQUITY OF BILL IN CHANCERY CAN BE QUESTIONED only by demurrer, or on the hearing. *Brill v. Stiles*, 384.
 2. DEFENDANT IN CHANCERY CANNOT DEMUR TO AND ANSWER same allegations in bill at one time. And after answer it is too late to demur, unless the answer is first withdrawn. *Id.*
 3. WHERE BILL IN CHANCERY CALLS FOR ANSWER under oath, the latter must be taken to be true in so far as it is responsive to the bill, and not contradicted by evidence. *Cassell v. Ross*, 270.
- See ESTOPPEL; HOMESTEADS, 6; MARRIED WOMEN, 4-10, 17-19; SET-OFF; SURETSHIP, 4; TAXATION, 3; TRUSTS; VENDOR AND VENDEE, 1, 2.

ESCHEATS.

See ALIENS.

ESTATES OF DECEDENTS.

1. PROBATE COURT OF COUNTY, OF WHICH DECEDENT WAS RESIDENT AT TIME OF HIS DEATH, alone has jurisdiction of the administration of his estate, and the inclusion of the portion of the county of which he was a resident within the boundaries of a new county formed after his death, will not transfer that jurisdiction to the probate court of the new county. *Estate of Harlan*, 58.
2. RESIDENCE OF PARTY AT TIME OF HIS DEATH, AND NOT SITUATION OF ESTATE, is the test of probate jurisdiction. *Id.*
See EXECUTORS AND ADMINISTRATORS; WILLS; WITNESSES, 4.

ESTOPPEL.

1. PARTY MAY ESTOP HIMSELF BY HIS OWN ACT of such character, and so performed as to induce another to pursue, and justify him as a man of ordinary prudence in pursuing, a given course of conduct, to deny the existence of the facts, on the belief of the existence of which, so induced, such course of conduct was adopted. *Muselman v. McIlhenney*, 445.
2. TO CREATE ESTOPPEL IN PAIS, STATEMENTS OR REPRESENTATIONS RELIED UPON must be shown to have been made with a willful intent to induce the party to whom they were made to act on the faith of them. *Plummer v. Lord*, 773.

2. **ESTOPPEL IN PAIS**, at common law, arose only in the case of those solemn and peculiar acts to which the law gave the power of creating a right, or passing an estate, and to which the law attached as much efficacy and importance as to matters appearing either by deed or of record. Mere acts, statements, or admissions of a party, when not made or performed under seal, of record, or in the course of some of those acts to which peculiar authority was attached by the law, were not considered as estoppels, and have no other weight than that of evidence. *Davis v. Davis*, 157.
4. **PLEADING ESTOPPEL IN PAIS**. — **EQUITABLE ESTOPPELS IN PAIS** are applied to prevent injury which would ensue to one from the acts or declarations of another were he permitted to gainsay the truth of such acts or declarations. It is invoked to prevent fraud; and in accordance with the rules of equity pleading, the party relying upon it must inform the adverse party of the nature of cause of action or defense which he will be obliged to meet. To do this, he must plead it with the same fullness and particularity as is required in cases involving like subjects of inquiry in suits of equity. *Id.*
5. **WHERE ESTOPPEL IN PAIS IS RELIED UPON AS DEFENSE, BUT NOT PROPERLY PLEADED**, and evidence of the facts constituting it is introduced without objection, the defect in the pleading will be considered waived. *Id.*
6. **ESTOPPEL IN PAIS**. — Whenever an act is done, or statement made by a party which cannot be contravened or contradicted without fraud on his part, and injury to others whose conduct, without fault on their part, has been influenced by the act or statement, the character of estoppel will attach to what would otherwise be mere matter of evidence. In all the cases in which the doctrine of equitable estoppel is applied, it will be found that it rests, for its foundation, upon the equitable principle that is ever invoked for the prevention of the mischievous consequences of fraud. *Id.*
7. **ESSENTIALS OF GOOD ESTOPPEL IN PAIS**. — Where the declarations of the owner of land are relied upon to raise an estoppel *in pais*, preventing his asserting his title, it must appear that when he made the declarations he was apprised of the true state of his title; that he made the declarations with the intention to deceive, or such culpable negligence as amounts to constructive fraud; that the other party relied upon such declarations, and will be injured by allowing their truth to be disproved; and that such other party was not only destitute of all knowledge of the true state of the title, but also of all convenient or ready means of acquiring such knowledge. *Id.*
8. **NOT ESTOPPEL IN PAIS**. — Where one who is ignorant of his title to a certain piece of land, and whose ignorance is not due to culpable negligence, without an intention to deceive, tells one whom he knows to be about to purchase the land that he has no title thereto, whereby the latter is induced to purchase the land, and pay full value therefor, this does not create such an estoppel *in pais* as would prevent the first party, or a purchaser from him, from asserting his title thereto, upon its discovery. *Id.*
9. **WHERE ESTOPPEL IN PAIS IS SOUGHT TO BE ESTABLISHED** by evidence of the declarations and admissions of persons made long anterior to the trial, this evidence cannot be too carefully scrutinized by the court or jury, as it is the most dangerous species of evidence that can be admitted in a court of justice, and the most liable to abuse. *Id.*

10. INSTRUCTION THAT WHERE TWO INNOCENT PARTIES MUST SUFFER, that party who has been the cause of another's loss must lose, is properly refused. *Id.*
11. WHERE ONE BORROWS SUM OF MONEY, AND GIVES HIS NOTE FOR LARGER SUM, payable to the bearer, with interest, and the person to whom it is given on the next day sells the note to a third person, to whom he procures the maker to execute a mortgage to secure the note, no inquiry being made, and no information given about the consideration of the note, the mortgagor is not estopped by the mortgage from pleading, against the mortgagee, a failure of consideration as to the amount of the difference between the face of the note and the sum actually borrowed: *Muselman v. McElhenry*, 445.

See PARTNERSHIP, 1; REALTY, 2; RES ADJUDICATA.

EVIDENCE.

1. PRIOR DECLARATIONS OF PERSON ARRESTED ON CRIMINAL CHARGE ARE COMPETENT EVIDENCE AGAINST HIM IN CIVIL SUIT, WHEN. — In a controversy as to whether a release of personal property has been obtained through duress, by means of an arrest upon a criminal charge, the declarations of the person arrested, made prior to the filing of the complaint, are competent evidence against him for the purpose of showing probable cause for the charge. *Hackett v. King*, 695.
2. EXCEPTIONS SHOWING THAT INCOMPETENT DECLARATIONS WERE ADMITTED IN EVIDENCE WILL NOT BE SUSTAINED UNLESS they also show what such declarations were. *Id.*
3. EVIDENCE THAT ONE HAS FOR YEARS BEEN LIVING BEYOND HIS APPARENT MEANS IS ADMISSIBLE as tending to confirm other evidence of his dishonesty in appropriating the property of his employer. *Id.*
4. PRACTICE AS TO EVIDENCE IN ACTIONS FOR DIVERTING WATER. — Where the answer, in an action for the wrongful diversion of water, sets up more than five years' continuous adverse possession in the defendant, and the plaintiff before resting introduces evidence tending to show his possession during the five years, and the defendant then introduces evidence to sustain the answer, the plaintiff may, if he does not wish to rely upon the proof already offered by him upon the same points, produce evidence tending to show that the defendant's enjoyment of his asserted right had not been continuous or uninterrupted or adverse. Such evidence is not in rebuttal, but is a part of the plaintiff's original case, and is admissible only in the discretion of the court, and for the furtherance of justice. He has no right, for such a purpose, to enter upon his original case and again prove the same facts that were proved by him in his opening. *Union Water Co. v. Crary*, 145.
5. PLAINTIFF'S WITNESSES CANNOT BE RE-EXAMINED BY HIM AFTER HE HAS CLOSED and defendant has introduced his evidence, except in the discretion of the court, where the issue between the parties is a contest between them as to which had the better right to a watercourse founded on prior possession and continued user, and the object of the offer is, in substance, to prove the same facts, perhaps more in detail, that those witnesses had testified to in chief for the plaintiff. *Id.*
6. OBJECTION IS WAIVED WHEN MADE TO DEPOSITION which is inadmissible, but is admitted under an agreement that the objection might be reserved to the argument and then pursued if the party objecting saw fit, at which time no allusion is made to it, nor any ruling asked upon it. *Heate v. Home Ins. Co.*, 240.

7. EVIDENCE IS ADMISSIBLE AS TENDING TO SHOW a fraudulent combination to insure and lose vessels, to prove a fraudulent loss of a particular insured vessel by the direct misconduct of the master, and in this connection inquiry may be made respecting a series of losses under suspicious circumstances, of vessels owned by one of the same parties and mortgaged and insured in the same manner as the one lost. *Id.*
 8. UPON QUESTIONS OF KNOWLEDGE, GOOD FAITH, OR INTENT, evidence of any other transactions from which any inference respecting the *quo animo* may be drawn, is admissible. *Id.*
 9. WHERE FRAUD IS IMPUTED AND WITHIN ISSUE, provable by various circumstances, a considerable latitude must be indulged, in the admission of evidence. *Id.*
 10. MOTIVE OR INTENT WITH WHICH ACT IS DONE, IS GENERALLY MATTER OF PRESUMPTION, depending on the nature of the act, and the circumstances attending its commission. *Chrisman v. Bruce*, 603.
 11. JUDICIAL OFFICER OF ANY GRADE MUST BE PRESUMED TO HAVE ACTED FROM BAD MOTIVE, where he knowingly and willfully renders a decision contrary to law; and proof of the act will, of itself, authorize the jury to presume the motive. *Id.*
 12. PRICE FOR WHICH GOODS SOLD AT AUCTION IS ADMISSIBLE AS EVIDENCE of their value. *Kent v. Whitney*, 739.
 13. LEGAL PRESUMPTIONS ARE RULES ESTABLISHED BY COMMON LAW OR STATUTE, and are founded upon the first principles of justice, or the laws of nature, or the experienced course of human conduct and affairs, and the connection usually found to exist between certain things. *McCagg v. Heacock*, 327.
 14. WHERE ONE FACT IS PROVED OR ASCERTAINED, another, its uniform concomitant, is universally and safely presumed; and it is this uniformly experienced connection which leads to its recognition by law, without other proof. Many of these presumptions are conclusive because they have been found to be so general and uniform as to render it expedient, from motives of public policy, for the sake of greater certainty and the promotion of the quiet and peace of the community, that this connection of fact should be taken to be inseparable and universal. *Id.*
 15. ANSWER FILED FOR DEFENDANT OVER SIGNATURE OF HIS ATTORNEY IS ADMISSIBLE AS EVIDENCE, in another action, of admissions of the allegations therein set out, but its weight as evidence is to be determined by the jury. *Ayres v. Hartford F. Ins. Co.*, 553.
 16. LAW PRESUMES THAT ALL ACTS ARE DONE IN GOOD FAITH, until there is evidence to the contrary. *McCagg v. Heacock*, 327.
 17. PROOF OF LAWS OF SISTER STATE BY PAROL TESTIMONY OF RESPECTABLE LAWYERS, who incorporate in their depositions sworn copies from the printed volume of those laws, is sufficient, independently of any statutory regulation. *Biesenthal v. Williams*, 629.
- See ACCORD AND SATISFACTION, 2, 3; BOUNDARIES, 5; CORPORATIONS, 7; CRIMINAL LAW, 7-9; DEEDS, 3-6, 14-16; ESTOPPEL, 9; EXECUTIONS, 18-21; EXECUTORS AND ADMINISTRATORS, 3, 4; INSURANCE, 7; MORTGAGES, 18; NEGOTIABLE INSTRUMENTS, 50; PLEADING AND PRACTICE, 14; REPLEVIN, 14; SALES, 5; TAXATION, 12; WITNESSES.

EXECUTIONS.

1. EXECUTION CAN BE AMENDED ONLY WHEN MERELY VOIDABLE, and not when absolutely void. *McCormick v. Wheeler, Mellick, & Co.*, 388.

2. **AMENDMENT OF VOIDABLE EXECUTION IS ALLOWED**, only when third persons can have no reasonable doubt, from the records, that the execution sought to be amended did in fact issue upon the judgment to which the amendment makes it conform, and are therefore not injured. But no court would ever create an execution by way of amendment where none existed before. *Id.*
3. **FAILURE OF JUSTICE ISSUING SECOND EXECUTION TO APPEND COPY OF RETURN TO FIRST EXECUTION**, which had been returned unsatisfied by reason of failure of sale after levy, for want of bidders, will not render the second execution void, but only voidable, and it might be set aside on motion before the justice; but if no such motion was made, all acts done under it will be valid. *Culbertson v. Milhollin*, 428.
4. **EXECUTION IS LIEN UPON CHATTELS ONLY FROM ACTUAL LEVY.** *Reese v. Sebern*, 513.
5. **AT SALE OF PERSONAL PROPERTY ON EXECUTION** there is no warranty of title to the property sold. *Bartholomew v. Warner*, 251.
6. **OFFICER SELLING PERSONAL PROPERTY** on execution is not, as a general rule, bound to make any representations as to the quality or title of the property offered for sale, but he ought to conduct the sale in perfectly good faith, and must not do anything to deceive or mislead the bidder. *Id.*
7. **OFFICER SELLING PERSONAL PROPERTY** under execution cannot actively aid the judgment creditors by concealing the fact, known to himself, that the execution debtor had no title to the property offered for sale. *Id.*
8. **EXECUTION CREDITOR IS BOUND BY SAME RULES** of honesty as any other vendor, as regards the sale made under the execution. *Id.*
9. **WHERE OFFICER SELLS PERSONAL PROPERTY** at execution sale, to which the execution debtor has no title, which fact is known to the officer, the purchaser may recover the money paid while lying in the hands of the officer, in an action for money had and received. *Id.*
10. **JUDGMENT DEBTOR MAY REDEEM AT ANY TIME WITHIN ONE YEAR AFTER EXECUTION SALE**, under the Iowa Revision of 1860, where, after a judgment became a lien upon the land, and before the land was sold under execution, the judgment debtor conveyed it, especially if his deed contains covenants against encumbrances and of warranty. *Harvey v. Spaulding*, 528.
11. **MONEY IN HANDS OF SHERIFF**, collected on execution, is in the custody of the law, and is not the property of the execution plaintiff until paid over to him. *Lightner v. Steinagel*, 292.
12. **SALES ON EXECUTION SHOULD NEVER BE SET ASIDE** in consequence of failure of title, except upon notice to the judgment debtor. *McOwensick v. Wheeler, Mellick, & Co.*, 388.
13. **EFFECT OF SETTING ASIDE SALE ON EXECUTION**, in consequence of failure of title, is to create prospective lien. Whether it is retrospective is not a question that could arise between the judgment debtor and creditor, as between them it could make no difference; and the rights of third persons are not affected, because they are not in court, and an order expressly subordinating their rights would be a nullity. But if the judgment creditor thus procuring a sale under his judgment to be set aside, claims on equitable grounds that the intervening rights of third persons should be subordinated to his lien, he must proceed by bill in chancery, make them parties, and give them an opportunity to defend, and a decree thus made will bind all parties. *Id.*

14. ENTRY ON EXECUTION DOCKET, UNDATED AND UNSIGNED, to the effect that a sale under and in satisfaction of an execution had been set aside at a certain term, affords no notice to a subsequent purchaser of other property under a junior judgment against the same debtor, that the prior sale had been set aside, there being no entry of record to that effect. *Id.*
 15. CONTESTS CONCERNING SURPLUS ARISING FROM SALES OR EXECUTION may be determined upon motion instead of by petition in equity or another action, especially where the facts are undisputed, or are susceptible of being clearly and easily ascertained. *Polk County v. Sypher*, 568.
 16. WHEN SURPLUS ARISING FROM SALE ON EXECUTION has been actually paid over by the sheriff to subsequent execution creditors of the same debtor, such creditors should be brought before the court, in order to determine a contest in regard to such surplus. *Id.*
 17. OFFICER EXECUTING DEED OF LAND SOLD BY HIM UNDER EXECUTION must recite therein the facts constituting his authority to sell and convey; as this is essential to show a transmission of the debtor's title in the property to the purchaser. *Donahue v. McNulty*, 78.
 18. RECITALS IN SHERIFF'S DEED ESTOP HIM AND THOSE CLAIMING THEREUNDER from denying the truth of the facts recited; but they are not evidence against strangers, or those claiming adversely to the deed. *Id.*
 19. SHERIFF'S DEED IS NOT EVIDENCE OF PURCHASER'S TITLE against one who is not shown upon the face of the deed to have been one of the judgment debtors and execution defendants, and whose interest in the property is not shown by the deed to have been sold and conveyed. *Id.*
 20. PAROL EVIDENCE IS INADMISSIBLE TO SHOW THAT EXECUTION SALE OF LAND was made by virtue of any other judgment or execution than that recited in the deed, or to show that the interest of a person in the land was sold whose interest is not shown upon the face of the deed to have been sold. *Id.*
 21. TESTIMONY OF OFFICER WHO SELLS PROPERTY UNDER EXECUTION, AND EXECUTES DEED THEREFOR, is not admissible for the purpose of contradicting, altering, or adding to the terms of the deed. *Id.*
 22. WHETHER INSUFFICIENCY OF SHERIFF'S ADVERTISEMENT OF SALE OF LAND UNDER EXECUTION, in that it merely gave notice that the sale would take place between the hours of nine o'clock, A. M., and the setting of the sun on the same day, instead of specifying a particular hour for the sale, would be ground for setting aside the sale, on motion, would probably depend upon the circumstances of each particular case, to be shown to the court by affidavit; but in order to raise the question, the motion must be made by the defendant in execution, and in apt time, for the objection cannot be taken collaterally, nor by third persons. *McCormick v. Wheeler, Mellick, & Co.*, 388.
- See ACCORD AND SATISFACTION, 2, 3; ATTACHMENTS, 3; CONFLICT OF LAWS; JUDGMENTS, 9; PARTNERSHIP, 2-6; PLEDGE; PROCESS, 2, 3.

EXECUTORS AND ADMINISTRATORS.

1. PERSON DOES NOT BECOME EXECUTOR DE SON TORT BY DOING MERELY ACTS OF KINDNESS AND CHARITY, touching the property of a deceased person, such as taking care of it, feeding stock, providing for children, and the like; but to constitute him such, his intermeddling with the goods of the deceased must be an illegal intermeddling. *Brown v. Sullivan*, 421.

2. PLAINTIFF IS ENTITLED TO COSTS GENERALLY IN ACTION AGAINST PERSON AS EXECUTOR DE SON TORT, if he recover five dollars or more in damages. *Id.*
3. PROBATE PROCEEDINGS ARE ADMISSIBLE IN EVIDENCE AGAINST SURETIES ON ADMINISTRATOR'S BOND, WHEN. — Probate proceedings in passing on an administrator's account, and a decree therein rendered directing the administrator to pay over a sum found remaining in his hands, are, in an action against the sureties on the administrator's bond for a breach of the bond by the principal, admissible in evidence against the sureties, although the sureties were not made parties to such probate proceedings. *Irwin v. Backus*, 125.
4. DECREE OF PROBATE COURT DIRECTING ADMINISTRATOR TO PAY OVER SUM FOUND DUE IS CONCLUSIVE upon the administrator and his sureties. Upon the refusal of the administrator to obey the same, the liability of the sureties attaches, and they cannot go behind the decree to inquire into the merits. *Id.*
5. SURETIES MAY SHOW IN DEFENSE WHEN SUMD UPON ADMINISTRATOR'S BOND for a breach thereof by the principal in not paying over a sum found due by the probate court and decreed by such court to be paid, that the bond was not made, or that such decree was not made, or that if made the same has been obeyed, or that it was obtained by fraud or collusion; but they cannot show that the court has erred in making the decree, or that no assets ever came into the possession of the administrator, although the court has so found and adjudged. *Id.*
6. CONFLICTING CASES SUMMARIZED AS TO ADMISSIBILITY OF PROBATE PROCEEDINGS in an action upon an administrator's bond against his sureties, for a breach of the bond by the principal, as to its effect when admitted. *Id.*

EXPERTS.

See WITNESSES, 3.

EXPRESS COMPANIES.

See COMMON CARRIERS, 8-10.

FISHERY.

1. LEGISLATURE MAY GRANT PRIVILEGES affording particular and exclusive benefits, for the purpose of increasing generally the product and value of the common right of fishery. *Phippe v. State*, 654.
2. WHETHER LEGISLATURE HAS POWER TO GRANT SEVERAL OR EXCLUSIVE RIGHTS of fishery in the navigable waters of the state of Maryland, *quere. Id.*
3. SECTION 17 OF ARTICLE 71, CODE OF MARYLAND, relating to the bedding of oysters, and authorizing any citizen of a county bordering on the waters of the state to locate and appropriate within the waters thereof an area not exceeding one acre, for the purpose of depositing and bedding oysters on certain conditions, is not unconstitutional as conferring special and exclusive privileges inconsistent with and in derogation of the common right of free fishery in the waters of the state. Nor is it repealed by the act of 1861, providing "that no patent shall issue for land covered by navigable waters." The latter only restricts and limits the powers of the land commissioner. *Id.*

6. **OYSTERS TAKEN BY ONE IN EXERCISE OF HIS COMMON RIGHT** of fishery thereby become the property of the taker. *Id.*
7. **SECTION 17 OF ARTICLE 71, CODE OF MARYLAND**, authorizing any citizen of a county bordering on the waters of the state to locate and appropriate within the waters thereof an area not exceeding one acre, for the purpose of depositing and bedding oysters on certain conditions, does not contemplate a transfer of the state's title to land covered by navigable water, but is a conditional license for the protection of private rights, revocable at the will of the legislature. It subtracts nothing from the common right of fishery, nor does it operate as a grant of several rights from the common right residing in the people. *Id.*
8. **LANDS OF MARYLAND COVERED BY NAVIGABLE WATER** may be granted, subject to the public right of navigation and fishery; and independent of the question as to the power of the legislature to restrain those rights by grants in severalty, they may be aided by grants conferring particular privileges. *Id.*

FIXTURES.

1. **PLATFORM SCALES ARE FIXTURE WHEN SET INTO SOIL** and firmly attached to a building, so that to remove them would leave an excavation under and in front of the building, and deface the room to which the weighing apparatus was fastened; and if they are put there by a tenant, they must be removed by him before the expiration of his term, or they will pass to the owner of the realty. *Bliss v. Whitney*, 745.
2. **VENDEE IN POSSESSION HAS NO RIGHT TO ERECT HOUSE UPON PREMISES** as property separate and distinct from the freehold, and an intention to do so, no matter how clearly manifested, is of no avail. *Ogden v. Stock*, 332.
3. **VENDOR MAY MAINTAIN REPLEVIN FOR HOUSE ERECTED UPON PREMISES** BY VENDEE IN POSSESSION under unexecuted contract of sale, and sold by him to another, who removes it from the land, so long as it can be identified, and is not permanently annexed to other realty. *Id.*

FORCIBLE ENTRY AND DETAINER.

DAMAGES ARE NOT RECOVERABLE IN FORCIBLE ENTRY AND DETAINER; but if damages are allowed which are only nominal in amount, the judgment will not be reversed therefor. *Brush v. Fowler*, 382.

See INJUNCTIONS.

FOREIGN LAWS.

See EVIDENCE, 17.

FORWARDERS.

See COMMON CARRIERS.

FRAUD.

FRAUD WHEN SET UP AS MATTER IN AVOIDANCE of a contract of insurance must be specially pleaded, and evidence thereof is not admissible without notice, under the Connecticut statute of 1843. *Howe v. Home Ins. Co.*, 240.

See EVIDENCE, 9.

GARNISHMENT.

See ATTACHMENTS.

GAS COMPANIES.

See NEGLIGENCE, 8-10.

GROWING CROPS.

1. GROWING CROP AS BETWEEN VENDOR AND VENDEE IS PART OF REALTY, and as a general rule the sale and conveyance of the land by its owner carries the property in the crop to the purchaser. *Turner v. Cool*, 449.
2. CONVEYANCE OF LAND CARRIES PROPERTY IN CROP GROWING THEREON TO GRANTEE, notwithstanding an agreement in writing previously signed by the parties expressly reserving the growing crop to the vendor; because, by the execution of the deed, the preliminary contract is executed, and any inconsistencies between its original terms and those of the deed are to be explained and settled solely by the deed into which the contract is merged. *Id.*
3. GROWING CROPS ARE PART OF REALTY, as between the successful plaintiff in an action of ejectment and the evicted defendant, and if the former is put in possession under his writ, and the latter nevertheless enters and carries away the crops, the plaintiff may maintain trover for their value; but the judgment cannot be for more than the *ad damnum*. *Alles v. Hinckler and Abbott*, 407.

HIGHWAYS.

1. IT IS GENERAL RULE AT COMMON LAW THAT NO ACTION LIES AGAINST TOWN for an injury sustained through any defect in a highway. *Barry v. City of Lowell*, 690.
2. NO ACTION AGAINST TOWN TO RECOVER FOR INJURIES occasioned by falling upon the ice on a dangerous sidewalk can be sustained by one who knows it to be dangerous, by means of ice upon it, and who voluntarily attempts to pass over it; though the town is bound to keep the way in repair. The burden is on the plaintiff to show the use of ordinary care. *Wilson v. City of Charlestown*, 693.
3. CITIES ARE UNDER POLITICAL OBLIGATION TO OPEN SUCH STREETS as the convenience of the community requires, but courts cannot compel the performance of such a duty, or hold them responsible for its non-performance. *City of Joliet v. Verley*, 342.
4. LEGAL OBLIGATION OF CITY TO REPAIR HIGHWAYS, SIDEWALKS, AND BRIDGES WITHIN CORPORATE LIMITS, is one voluntarily assumed by its corporate authorities, and relates to such as are opened or constructed under its authority, and those which its officers assume control over for that purpose. *Id.*
5. CITY IS UNDER NO OBLIGATION TO MAKE APPROACHES OR PASSAGEWAYS to a bridge erected by the canal trustees within the city limits; but when the city in the exercise of its authority undertakes to make the passages to a bridge erected under such circumstances, it must do so in a way not to endanger the lives or limbs of its inhabitants. *Id.*
6. CITY IS GROSSLY DERELICT IN ITS DUTY in constructing a passage-way on the border of an embankment without sufficient guards for the protection of travelers. *Id.*
7. RULE AS TO LIABILITY OF MUNICIPAL CORPORATION IN RESPECT TO HIGHWAY is, that "where the loss is the combined result of an accident,

and of a defect in the road, and the damage would not have been sustained but for the defect, although the primary cause be a pure accident, yet if there be no fault or negligence of the plaintiff, if the accident be one which common prudence and sagacity could not have foreseen and provided against, the corporation is liable." *Id.*

9. WHERE CORPORATION IS EMPOWERED BY STATUTE to establish and build a turnpike, and land is condemned, and compensation made to the then owners of the soil, a subsequent purchaser takes *cum onere*, and the legislature may, by a subsequent act, authorize the corporation to occupy and grade the road, without any new condemnation and compensation to such purchaser. Any compensation which could be claimed in such a case would be by the community which had borne the burden of the original condemnation. *Dougllass v. Boonsborough Turnpike Co.*, 647.
9. GRANT TO PRIVATE CORPORATION MUST BE CONSTRUED STRICTLY, but not so as to defeat the object of the grant; and the laws relating to public highways in Maryland must be given a liberal construction. *Id.*
10. BY TRANSFER OF TURNPIKE ROAD FROM PUBLIC to a corporation, the title to the soil is not changed, but remains in the owners of the soil of the adjoining lands, and they have the same use and enjoyment of it that they had before. The easement or right of way is transferred to the corporation, to be held by them while they work and keep the road in repair, subject to the public's right to use it upon paying toll. *Id.*
11. DISTINCTION BETWEEN OCCUPATION OF HIGHWAY by a railroad or a canal and by a turnpike company is, that the occupancy of the former is permanent and exclusive, while the turnpike is considered a public highway, over which every citizen has a right to travel in his own mode of conveyance, and the imposition of tolls is only a method of keeping the road in repair. *Id.*
12. WHERE COUNT IN DECLARATION CLAIMS CONSEQUENTIAL DAMAGES for injuries to private property from grading a road by a turnpike corporation, and the recovery of such damages is dependent upon facts to be found by the jury, an instruction that if the corporation did acts unnecessary and improper to the grading of the road, then the corporation would be liable, is proper. *Id.*

See WAYS.

HOMESTEADS.

1. TITLE TO HOMESTEAD USUALLY BEING VESTED IN HUSBAND, he must be treated as acting, at least to some extent, as the trustee of the wife and children for the protection of this right cast by the law upon them; and by virtue of his relation to their rights, he is necessarily vested with power to perform all acts necessary to secure the title, and thus effectuate the design of the statute. *Cassel v. Ross*, 270.
2. HUSBAND IS AUTHORIZED, WHEN NECESSARY, to purchase an outstanding title for the purpose of securing the enjoyment of the homestead right. *Id.*
3. WHEN HUSBAND HOLDING TITLE TO HOMESTEAD has purchased an outstanding title, it will be presumed to have been necessary. But this presumption may be rebutted by the wife upon showing that she or her husband owned the paramount title at the time when such purchase was made. *Id.*
4. PRESUMPTION IS THAT HUSBAND ACTS FOR BENEFIT OF WIFE and children, when he acquires or perfects a title to the homestead. *Id.*

5. HUSBAND MAY, WITH OR WITHOUT CONSENT OF WIFE, when already in possession under a defective title, acquire an outstanding title on credit, and he cannot, but the wife may, deny that it was paramount. And until it appears that such a title was not acquired, the consideration agreed to be paid therefor will be treated as purchase-money. *Id.*
6. WHEN IT IS SOUGHT BY BILL IN CHANCERY to subject the homestead to the payment of a purchase of an outstanding title, the wife is a necessary party to the bill. *Id.*
7. WHEN IT IS SOUGHT TO SUBJECT HOMESTEAD TO PAYMENT of the purchase of an outstanding title, and the wife shows that the paramount title was held by herself or her husband, at the time that the purchase was made, the consideration agreed to be paid therefor will not be regarded as purchase-money so as to subject the land to its payment; but all proceedings will be enjoined which tend to deprive the wife of the homestead to the extent of one thousand dollars; but if it appears that the outstanding title purchased was paramount, then a sale must be decreed to enforce the payment of the purchase-money. *Id.*
8. HUSBAND AND WIFE MUST CONCUR IN DEED OR MORTGAGE OF HOMESTEAD, in order that it may have any validity, under the Iowa Revision of 1880. *Burnap v. Cook*, 507.
9. HOMESTEAD RIGHT IS SUBORDINATE TO THAT OF VENDOR for his unpaid purchase-money. *Id.*
10. MORTGAGE OF HOMESTEAD IS NOT SUBROGATED TO VENDOR'S RIGHTS AS TO PURCHASE-MONEY, so that the mortgage is valid, where, after the purchase of the land and the execution of a mortgage thereon to the vendor to secure the purchase-money, and the use of the land as a homestead, the husband became bound as surety for another, and subsequently assumed payment of the debt and executed the mortgage of the homestead alone to secure payment thereof, in consideration of receiving a credit of a like amount, obtained by the principal debtor from the vendor, on the purchase-money notes. *Id.*
11. WIFE CANNOT BE AFFECTED BY DECREE IN PROCEEDING TO FORECLOSE MORTGAGE ON HOMESTEAD, to which she was not a party. *Id.*
12. HOMESTEAD RIGHT IN PREMISES MAY BE LOST under conveyance executed by husband and wife, though they do not relinquish such right in the form required by statute, if in pursuance of such conveyance they abandon possession to the vendee. *Brown v. Cook*, 402.
13. RIGHTS OF INFANT CHILDREN IN HOMESTEAD ARE UNDER CONTROL OF PARENTS during the joint lives of the latter. *Id.*
14. ACTUAL REMOVAL FROM HOMESTEAD WITH NO INTENTION TO RETURN is a waiver or forfeiture of the right, amounting to an abandonment as against purchasers or creditors, even though no new homestead be gained. *Fyffe v. Beers*, 577.
15. TEMPORARY REMOVAL FROM HOMESTEAD DOES NOT AMOUNT TO ABANDONMENT thereof, and the homestead will be treated as still existing, if the *animus revertendi* is established, and third persons have not been led to believe that it was not a homestead by the owner being thus out of possession, and to act upon this belief by purchasing or specifically altering their condition upon the faith that it was not exempt as a homestead. *Id.*
16. WHETHER REMOVAL FROM HOMESTEAD WAS ACTUAL SO AS TO CONSTITUTE ABANDONMENT, or merely temporary, depends upon the peculiar facts of each case, and no general rule for the determination of the question can be enunciated. *Id.*

17. POSSESSION BY OWNER OF HOMESTEAD OF ADJOINING TRACT OF LAND under parol contract of purchase, and improvement thereof as part of the homestead, will operate to exempt such land from judicial sale to satisfy a debt contracted after such purchase but before actual conveyance to him. *Id.*
18. JUDGMENT LIEN DOES NOT ATTACH TO PREMISES HELD BY JUDGMENT DEBTOR AS HOMESTEAD, either while used as such, or after sale and transfer of possession, if the premises were used as a homestead before the debt upon which judgment was rendered was contracted. *Cummings v. Long*, 502.

HOMICIDE.

See CRIMINAL LAW, 2-10.

HUSBAND AND WIFE.

See HOMESTEADS; MARRIED WOMEN.

INDICTMENTS.

See CRIMINAL LAW, 12, 14, 16.

INJUNCTIONS.

PERSON IN QUIET POSSESSION OF REAL ESTATE CLAIMING AS OWNER may obtain an injunction to restrain others from dispossessing him by means of a writ of possession issued on a judgment to which he was not a party; or if he has been dispossessed under such a writ, he may resort to his action of forcible entry and detainer to restore him to the possession from which he has been forcibly and unlawfully ejected. *Brush v. Fowler*, 382.

INSOLVENCY.

1. ABSOLUTE SALE BY INSOLVENT DEBTOR OF ALL HIS PROPERTY IS VALID, if made in good faith, and for a valuable consideration, without any contingent interest remaining in him. *Buell v. Buckingham*, 516.
2. ATTACHING CREDITOR CANNOT AVOID SALE AND DELIVERY OF PERSONAL PROPERTY on the mere ground that such sale was made with intent to prefer another creditor, in violation of the provisions of the insolvent law. *Gardner v. Lane*, 779.

INSURANCE.

1. ONE HAS INSURABLE INTEREST IN REALTY, where the title bond therefor has been assigned to him, and the obligee in such bond has made valuable improvements upon such property. *Ayres v. Hartford Fire Ins. Co.*, 553.
2. ALIENATION OF INSURED PROPERTY WILL END POLICY as to assured, if he retains no further interest in the property; but if an interest is still retained, the policy, in the absence of special stipulations to the contrary, will cover and protect that interest. *Id.*
3. UNDER CONDITION IN POLICY OF INSURANCE THAT IN CASE OF ANY SALE, TRANSFER, or change of title, in the property insured such insurance shall be void and cease, a merely nominal transfer, as collateral security for debts which are liens on the property, will not avoid the policy. *Id.*

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4. UNDER CONDITION IN INSURANCE POLICY THAT IN CASE OF ANY SALE, TRANSFER, or change of title, in the property insured, such insurance shall be void and cease, a transfer which would increase the temptation on the part of the assured to defraud the underwriter or lessen his interest in preventing a destruction of the property, will avoid the policy. *Id.*
5. INSURANCE COMPANY IS NOT BOUND BY MERE KNOWLEDGE OF ITS AGENT, of acts which would avoid a policy, and to which he makes no objection. *Id.*
6. HOLDING PROPERTY IN SECRET TRUST TO DEFRAUD CREDITORS OF REAL OWNER is not such a holding in trust as is contemplated by a condition in an insurance policy, providing that "property held in trust or on commission must be insured as such, otherwise the policy will not cover such property," and that "by property held in trust is intended property held under a deed of trust, or under the appointment of a court, or held as collateral security." *Id.*
7. PAROL EVIDENCE IS NOT ADMISSIBLE TO SHOW THAT AGENT OF INSURANCE COMPANY failed in writing the application to take down the statements by the applicant, or changed them, if he had authority only to receive and forward applications; but if he is authorized and does pass upon the risk in question, without submitting it to the principal, the latter is estopped from asserting that he has been misled by the representations of the application, by reason of the mistake of the agent in writing answers to questions asked. *Id.*
8. NOTICE OF LOSS GIVEN BY THIRD PERSON FOR ASSURED, such person being interested in the policy but not the agent of the assured, is not sufficient under a stipulation that all persons shall, upon loss, deliver a particular account of loss or damages, signed by their own hands. *Id.*
9. MERE SILENCE OF INSURANCE COMPANY WILL NOT AMOUNT TO WAIVER OF DEFECTS in proof of loss; but an objection to the proofs upon one specific ground, and silence as to another in which was the real defect, operates as a waiver of the latter. *Id.*
10. WHERE INSURER KNOWING VESSEL TO BE UNSEAWORTHY at the time of issuing the policy, elects to continue the risk and take the entire premium, and thereby induces the insured to rely on the policy as in force, he is estopped, after loss, from claiming that the policy did not attach because of the unseaworthiness of the vessel. But it is not sufficient that he "had reasonable means and opportunity of ascertaining the facts." *Hoxie v. Home Ins. Co.*, 240.
11. INSURER IS ENTITLED TO PRESUME SEAWORTHINESS of vessel insured. He is also entitled to presume that the insured knew the condition of his vessel when he applied for insurance, in the absence of proof either way. Therefore, in case of loss resulting from unseaworthiness known to the insured at the inception of the risk, he is guilty of fraud in concealing the facts and claiming the loss, and is estopped from setting up a claim of waiver of unseaworthiness by the insurer. *Id.*
12. THERE IS IMPLIED WARRANTY OF SEAWORTHINESS incident to time policies of insurance as well as to voyage policies, as such warranty is a necessary incident to all contracts of marine insurance. *Id.*
13. AMOUNT OF PREMIUM PAID is not a factor to be considered in determining the degree of seaworthiness warranted by implication, in a time policy of insurance on a vessel. *Id.*
14. POLICY OF INSURANCE IS AVOIDED BY SALE OR TRANSFER BY ONE PARTNER to one of his copartners, of his interest in the partnership property.

without the consent of the company, and before the loss occurs, where the policy contains the condition, "that in case of any sale, transfer, or change of title of any property insured by this company, or of any undivided interest therein, such insurance shall be void and cease." And it is not material that such sale and transfer were made without the assent of another partner. *Hartford Fire Ins. Co. v. Ross*, 452.

15. POLICY OF INSURANCE ON DWELLING-HOUSE OCCUPIED BY TENANT containing a stipulation that "the policy becomes void when the occupant personally vacates the premises, unless immediate notice be given to this company and additional premium paid," will become void if the building is vacated and no notice is given except to an agent of the company whose authority is limited to the receiving and forwarding applications for insurance to the company, to the collection of premiums, and to binding the company on special hazards for the term of ten days, and no additional premium is paid; and it is immaterial, in such case, that the insured did not know the limited extent of the agent's authority. *Harrison v. City Fire Ins. Co.*, 751.
16. WHERE APPLICANT FOR INSURANCE ON BUILDING MAKES EXPRESS ORAL PROMISE that it shall be occupied, and a policy is thereupon delivered to him, such policy will not be avoided by his subsequent failure to fulfill such promise, unless fraud is proved, even though the risk be increased by the building being unoccupied. *Kimball v. Aetna Ins. Co.*, 796.

See EVIDENCE, 7; FRAUD.

INTEREST.

See USURY.

JUDGMENTS.

1. JUDGMENT IS CHOSEN IN ACTION, WHICH PASSES TO ASSIGNEE SUBJECT TO EQUITIES which could be asserted against it in the hands of the assignor. *Ballinger v. Tarbell*, 527.
2. JUDGMENT IS ASSIGNABLE CHOSEN IN ACTION, which the assignee takes subject to and charged with all the equities which could be asserted against it in the hands of the assignor. *Isett and Brewster v. Lucas*, 573.
3. EQUITIES BETWEEN TWO PARTIES TO JUDGMENT arising from other and independent transactions are not available against such instruments in the hands of an assignee, nor are equities asserted by persons not parties to the judgment or their assignees: *Per Cole and Lowe, JJ.; Wright, C. J., and Dillon, J.*, expressing no opinion. *Id.*
4. EQUITIES ATTACHING TO DEBT ARE MERGED INTO JUDGMENT therefor, and cannot be asserted against an application for a *mandamus* to enforce the payment of the same. *Coy v. City Council of Lyons*, 539.
5. JUDGMENT CREDITOR IS NOT PURCHASER NOR AFFECTED BY WANT OF NOTICE, and a misdescription of land of the judgment debtor, in a recorded mortgage executed prior to the judgment, would not confer on such creditor a lien prior to that of the mortgagee; and the latter would be entitled, as against the judgment creditor, to have the mortgage reformed and foreclosed. *Swartz v. Stees*, 588.
6. THIRD PARTIES MAY PURCHASE JUDGMENT AND TAKE ASSIGNMENT OF IT, with or without notice. *Mitchell v. Hockett*, 151.
7. RULE OF CAVEAT EMPTOR APPLIES IN PURCHASE OF JUDGMENT, so far as third persons are concerned, in the same manner as it does to the par-

- chase of any other personal property. If the assignor has no title, the purchaser will take none, whether he has notice of such fact or not. *Id.*
8. ASSIGNMENT OF JUDGMENT NEED NOT BE UNDER SEAL. *Id.*
 9. JUDGMENT MAY BE SATISFIED BY EXECUTION WITHOUT RETURN OF NOTE FRAUDULENTLY GIVEN IN SATISFACTION OF IT. — Where a judgment debtor delivers to the judgment creditor a promissory note of third persons in satisfaction of the judgment, which is void because fraudulently obtained by the judgment debtor from the payors, it is unnecessary for the judgment creditor to return the note before enforcing his judgment by execution. *Id.*
 10. JUDGMENT BY DEFAULT IN ACTION IN WHICH ORIGINAL NOTICE WAS NOT SERVED NUMBER OF DAYS REQUIRED BY LAW IS ERRONEOUS, but it cannot be questioned in a collateral proceeding. *Ballinger v. Tarbell*, 527.
 11. JUDGMENT IN FAVOR OF SOLE PLAINTIFF MAY BE SET OFF AGAINST JUDGMENT IN WHICH HE IS JOINT DEFENDANT, under the Iowa Revision of 1860, which abrogates all distinctions between joint and joint and several liabilities. *Id.*
 12. CIRCUMSTANCES UNDER WHICH JUDGMENT CANNOT BE MODIFIED. — When the complaint, evidence as admitted, the verdict, and judgment are in harmony, and the judgment is erroneous because it includes more land than plaintiff is entitled to under a proper construction of the description thereof contained in a deed in evidence, the supreme court cannot modify the judgment without setting aside the verdict, etc., and will therefore reverse the judgment, and order a new trial. *Hicks v. Coleman*, 103.
 13. JOINT VERDICT, AND JOINT JUDGMENT THEREON, CANNOT BE OBJECTED TO BY DEFENDANTS having separate possessions, and who have been joined as defendants in an action to recover land, where no demand was made at the close of the trial for separate verdicts, and no objection or exception was taken to the verdict on that ground in time to afford an opportunity to correct it. *Id.*
 14. NO INJURY CAN RESULT FROM JOINT VERDICT in an action to recover real estate, where no damages have been claimed. *Id.*
 15. DIVIDED COURT, EFFECT OF UPON DECREE OR JUDGMENT. — At early common law, when the judges were equally divided in opinion upon an essential question of law, no judgment would be given; but here the practice is different. *Durant v. Essex Company*, 685.
 16. SAME. — FINAL DECREE OF SUPREME COURT OF UNITED STATES, RENDERED BY DIVIDED COURT, dismissing a bill in equity after a hearing, is a bar to a subsequent suit in equity, in the state court, where the case originated, for the same cause and between the same parties. *Id.*
 17. SAME. — DECREE RENDERED BY DIVIDED COURT DOES NOT MEAN that they are divided as to the question whether it should be rendered, but merely as to the questions of law involved in it. *Id.*
 18. SAME. — DECREE RENDERED BY DIVIDED COURT IS BINDING ON PARTIES to the suit, and is a bar to another suit for the same cause. Such has always been the effect of a decree dismissing a bill in equity after hearing, when it is not expressed to be dismissed without prejudice. *Id.*
 19. PRACTICE IN UNITED STATES SUPREME COURT AND IN STATE COURTS OF NEW YORK AND MASSACHUSETTS AS TO RENDERING JUDGMENT WHERE COURT IS DIVIDED. — If a cause is tried before a single judge, and his ruling upon an essential point is excepted to, and the judges are equally divided in respect to it after argument, judgment is commonly rendered in conformity with his ruling. *Id.*

20. **SAME. — IF SINGLE JUDGE BEFORE WHOM CAUSE IS TRIED** reserves questions of law for the consideration of the full court, and the judges are equally divided on a point which involves the plaintiff's right to recover, judgment is commonly rendered for the defendant. *Id.*
21. **SAME. — IF CAUSE IS BROUGHT UP FROM LOWER COURT** on a question of law by exception or appeal, and the judges are equally divided, the judgment of the lower court is commonly affirmed. *Id.*
22. **SAME. — PRESUMPTION IS STRONG THAT POINT DECIDED BY SINGLE JUDGE** has been decided rightly, and it is reasonable in such cases that this presumption should stand. *Id.*
23. **PREMATURE JUDGMENT ON CONSTRUCTIVE SERVICE OF PROCESS** IS CLERICAL MISPRISION, and cannot be reversed until the circuit court has refused on motion to correct it. *Buckner v. Bush*, 634.
24. **ENTRY OF JUDGMENT DOES NOT OPERATE AS CONSTRUCTIVE NOTICE OF EXISTENCE OF JUDGMENT** against the defendants not included in the entry, under the Iowa code of 1851, where the entry is made in the record-book and in the judgment docket in the name of one of the defendants only, with the addition of "*et al.*" to the name. *Cummings v. Long*, 502.
25. **LAW OF OHIO AUTHORIZING PERSONAL JUDGMENT AGAINST DEFENDANT** upon whom process had been served by a copy left at his dwelling, when he had absented himself to avoid process, cannot be held invalid in Kentucky as between citizens of the former state. The jurisdiction of the former court being established, the judgment must be received as *prima facie* evidence, at least, that all its mandates were in accordance with the law, and binding on the parties until legally impeached or reversed. *Blesenthall v. Williams*, 629.
26. **SUPPOSED OR TECHNICAL ERROR IN OVERRULING MOTION FOR NONSUIT** will not be ground for reversal of a judgment after trial on the merits. *Ayres v. Hartford F. Ins. Co.*, 553.
27. **ONE NOT PARTY TO JUDGMENT OR DECREE CANNOT BE INJURIOUSLY AFFECTED THEREBY.** *Brush v. Fowler*, 383.
28. **DECISION, THOUGH ERRONEOUS, CANNOT BE REVERSED, unless prejudicial to the appellant.** *Buckner v. Bush*, 634.
- See CORPORATIONS, 10, 12, 13, 15; EJECTMENT, 1; HOMESTEADS, 18; PLEADING AND PRACTICE, 7, 9; REALTY, 2.

JUDICIAL SALES.

- SALE MAY BE ADJOURNED** by sheriff, public officer, or trustee appointed to make it, without giving further notice. *Hoemer v. Sargent*, 638.
- See EXECUTIONS, 5-10, 12-17, 20-22; MORTGAGES, 9, 19, 20; PARTNERSHIP, 4-6; POWERS.

JURISDICTION.

See ESTATES OF DECEDENTS.

JURY AND JURORS.

- No ERROR IS COMMITTED BY WITHDRAWING SPECIAL ISSUES FROM JURY AND RECEIVING GENERAL VERDICT**, if counsel on both sides consent to it, where the jury announce that they cannot agree upon the special issues submitted to them, but can agree upon a general verdict. *Mitchell v. Hockett*, 151.
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See CRIMINAL LAW, 13-15; NEGLIGENCE, 2, 3, 11, 12; PLEADING AND PRACTICE, 13; QUESTIONS OF LAW AND FACT.

LANDLORD AND TENANT.

See DAMAGES, 10, 11; FIXTURES, 1; REPLEVIN, 4.

LICENSE.

See MINES AND MINING, 2-5.

MALICIOUS PROSECUTION.

1. PROBABLE CAUSE IS REASONABLE GROUND OF SUSPICION, supported by circumstances sufficiently strong in themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged. *Ross & Co. v. Innis*, 373.
2. WANT OF PROBABLE CAUSE IS MAIN GROUND OF ACTION FOR MALICIOUS PROSECUTION, and must be clearly shown. The burden of proof is upon the party bringing the action, to show that the criminal prosecution was the offspring of malice, and without any probable cause to justify it. *Id.*
3. MALICE MAY BE INFERRED FROM WANT OF PROBABLE CAUSE, but a want of probable cause cannot be inferred from malice. *Id.*
4. AMONG CIRCUMSTANCES TENDING TO SHOW WANT OF PROBABLE CAUSE, the good character of the accused should be given a prominent place. *Id.*
5. ADVICE OF COUNSEL, DELIBERATELY REQUESTED AND OBTAINED, if favorable to the prosecution, will go far, in the absence of other facts, to show probable cause, and to negative malice, in an action for malicious prosecution. *Id.*

MANDAMUS.

GOVERNOR CANNOT BE COMPELLED BY MANDAMUS to perform acts within the exercise of his judgment and discretion. *Miles v. Bradford*, 642.

See CORPORATIONS, 10-14.

MARKETS.

1. POWER TO ESTABLISH AND REGULATE MARKETS includes power to purchase a site and erect the necessary buildings and stalls upon it, and when provided, to adopt such rules in regard to it, and to the business to be there transacted as may be deemed reasonable and just. *Caldwell v. City of Alton*, 282.
2. MARKET IS DESIGNATED PLACE IN TOWN OR CITY to which all persons can repair who wish to buy or sell articles there exposed for sale, or it is defined by English law to be a franchise or liberty derived from the crown, or in some cases held by prescription, which presupposes a grant and may be granted to a public body or a private person. *Id.*

See CORPORATIONS, 16-21.

MARRIAGE AND DIVORCE.

1. STATUTE CONFIRMING AND MAKING VALID, from the time of their celebration, all marriages before made and celebrated in or out of the state of Maryland by and between persons related within certain degrees of affinity, and providing that all such marriages shall be held and taken by the courts in the state to be good and sufficient in law, to all intents

- and purposes, is constitutional, though retroactive in effect and in conflict with an earlier statute. *Harrison v. State*, 658.
2. **RIGHT TO CONFIRM IS NECESSARY COROLLARY OF POWER** to dissolve marriage by divorce. The consequence of which is, incidentally, authority to determine the *status* of the issue of the marriage. *Id.*
 3. **LEGISLATION CONFIRMING AND MAKING VALID MARRIAGES** which were before voidable is neither extraordinary, unconstitutional, nor unjust, but conservative, essential, and salutary, being the only adequate means of healing or preventing inevitable public and private wrongs. *Id.*
 4. **CANONICAL DISABILITIES AS REGARDS MARRIAGE** are such as render the marriage voidable, and not void. They require a judgment of a court, during the lives of the parties, to make them effective as causes of divorce. *Id.*
 5. **CIVIL DISABILITIES AS REGARDS MARRIAGE**, arising from want of capacity to contract, or physical infirmity, avoid the marriage *ipso facto*, without the action of a court. *Id.*
 6. **MARYLAND ACT OF 1777, DECLARATORY OF CANON** as part of the common law, and prohibiting marriage between persons related within certain degrees of affinity and consanguinity under certain penalties, declaring that such marriages should be "void," and giving to the general court jurisdiction to hear and determine upon such marriages, did not contemplate that by the use of the word "void," such marriages should be absolutely void *ipso facto*, but only void upon judgment and decree of the court during the lifetime of the parties. *Id.*
 7. **WHEN MARRIAGE IS DECLARED VOID BY STATUTE**, it does not necessarily mean void *ab initio*. Reason and justice would imply it was void from the time its nullity should be pronounced by a court of competent jurisdiction, not that it should be so construed whenever brought incidentally in question. *Id.*

MASTER AND SERVANT.

1. **IN ACTION AGAINST OWNER OF RAILROAD, BROUGHT BY HIS SERVANT TO RECOVER DAMAGES FOR PERSONAL INJURY** sustained by him from a locomotive-engine's running upon him from a turn-table in consequence of the want of a sufficient brake, the defendant may introduce evidence to show that the person who had charge for him of all the engines on the road had given instructions, before the accident, to the engineers to have the wheels of the engines blocked, while turning on the turn-table, and that this accident occurred by failure of some servant of the defendant to obey such instructions; although such instructions were not known to the plaintiff. *Durgin v. Munson*, 777.
2. **RAILROAD COMPANY IS LIABLE FOR INJURY TO ONE OF ITS SERVANTS**, caused by a want of repair in the road-bed of the railroad. *Snow v. Houstonian R. R. Co.*, 720.
3. **WORKMAN OR SERVANT IS SUPPOSED TO KNOW, AND TO ASSUME, RISKS** naturally incident to the employment upon which he enters, among which is the negligence of other servants employed in similar services by the same master, although they may be reasonably fit for the service in which they are engaged. *Id.*
4. **EMPLOYER OR MASTER IS NOT LIABLE FOR INJURIES CAUSED FROM WANT OF CARE AND CAUTION** by servant toward his fellow-servants, which due care on the part of the employer or master could in no way prevent. *Id.*

5. **EMPLOYER OR MASTER IS LIABLE FOR INJURIES TO SERVANTS OR WORKMEN** which happen by reason of improper and defective machinery and appliances used in the prosecution of a work. It is on this principle that the proprietors of a railroad are responsible for accidents happening by tracks improperly laid, etc. *Id.*
6. **MASTER OR EMPLOYER IS BOUND TO USE DUE CARE IN SUPPLYING AND MAINTAINING SUITABLE INSTRUMENTALITIES** for the performance of the work or duty which he requires of his agents or servants, and will be liable for damages occasioned by a neglect or omission to fulfill this obligation, whether it arises from his own want of care or that of his agents to whom he intrusts the duty. But this liability does not extend so far as to require of him that he should be responsible for the negligence of his servants, if of competent skill and experience, in using or managing the means and appliances placed in their hands in the course of their employment, if they are neither defective nor insufficient. *Id.*
7. **RAILROAD COMPANY IS NOT LIABLE TO ONE EMPLOYEE FOR INJURIES OCCASIONED BY ANOTHER**, where both are engaged in the same undertaking; and it makes no difference that the injury is the result of negligence of an employee of higher authority, to whom the injured employee is subject, and from the consequences of whose negligence he cannot guard. *Thayer v. St. Louis R'y Co.*, 409.
8. **RAILROAD COMPANY IS LIABLE TO EMPLOYEE FOR INJURIES HAPPENING TO HIM** from its negligence in employing incompetent persons in the management of the road and trains, or unsafe machinery in the running of them, or using the road when defective, if the injuries actually happen from such causes, and the employee injured has not the same means of knowledge of the existence of such causes as the employer. *Id.*

MARRIED WOMEN.

1. **IN CALIFORNIA, NO TITLE TO SEPARATE PROPERTY OF WIFE, EITHER REAL OR PERSONAL, CAN BE CONVEYED**, except by an instrument in writing, executed and acknowledged by her in the mode prescribed by statute. *Macley v. Love*, 133.
2. **IN CALIFORNIA, WIFE CAN CREATE NO LIEN OR ENCUMBRANCE ON HER SEPARATE PROPERTY**, unless by an instrument in writing, signed by the husband and wife, and acknowledged by her upon examination separate and apart from her husband. *Id.*
3. **WIFE HAS, IN CALIFORNIA, NO POWER BY CONTRACT TO CREATE PERSONAL LIABILITY** against herself in any form, aside from exceptional cases, as under the act relating to sole traders. *Id.*
4. **RIGHTS OF MARRIED WOMEN AS TO THEIR SEPARATE PROPERTY**, and their power over it in California, do not depend alone upon the principles of the common law, or upon the doctrines of courts of equity; but mainly upon the constitution and statutes of the state. *Id.*
5. **POWERS OF COURTS OF EQUITY RELATIVE TO SEPARATE ESTATE OF MARRIED WOMEN**, discussed. Married women need no longer look to equity merely for the protection or the enjoyment of their separate estates. The statute is now the source of their right to, and power of disposition over, such estates. *Id.*
6. **POWER OF COURT OF EQUITY OVER SEPARATE ESTATE OF MARRIED WOMEN IN CALIFORNIA**. — In this state a court of equity has no power to enforce any claim or demand as a charge or encumbrance on the separate estate of a married woman, unless such claim or demand has become a charge,

- Her, or encumbrance thereon, by virtue of a contract, evidenced by an instrument in writing, signed and acknowledged by the wife in accordance with the provisions of the statute. *Id.*
7. ACT OF APRIL 17, 1850, defining rights and duties of husband and wife, and act of April 16, 1850, concerning conveyances, commented upon. *Id.*
 8. SEPARATE ESTATES AND THEIR INCIDENTS were originally creations of courts of equity. *Id.*
 9. RESTRICTIONS IMPOSED BY CALIFORNIA STATUTE, as to form in which married women must encumber her separate estate, do not exist in equity. *Id.*
 10. MARRIED WOMAN CANNOT BIND HER SEPARATE ESTATE BY NOTE, ETC. — In California, a married woman cannot create a charge or encumbrance upon her separate estate by the execution of a note in consideration of services rendered, or moneys furnished, for her benefit, or the benefit of her separate estate, or by the purchase of goods for her separate use, with the intent and understanding that her separate estate shall be bound for the demand; nor can a court of equity impose and enforce such claim or demand as a charge or encumbrance upon her separate estate. *Id.*
 11. SECTION 6 OF ACT OF APRIL 17, 1850, DEFINING RIGHTS AND DUTIES OF HUSBAND AND WIFE, IS NOT UNCONSTITUTIONAL. The wife has a right to alienate or encumber her separate estate as there prescribed. If that portion of the section requiring the instrument to be signed by the husband were unconstitutional, it would not vitiate the remainder of the section, if valid in other respects. Requiring the signature of the husband is only an additional safeguard, and not so vitally connected with the object and scope of the act that it cannot be stricken out without vitiating the whole section. *Id.*
 12. ACT OF APRIL 17, 1850, DEFINING RIGHTS AND DUTIES OF HUSBAND AND WIFE IN CALIFORNIA, APPLIES "to property held as separate by woman married after the passage of the act," without reference to the time when it was acquired. *Id.*
 13. LIABILITY OF MARRIED WOMAN'S SEPARATE ESTATE FOR HER DEBTS. — Where debt created by married woman's contract is expressly made a charge on her separate estate, or is expressly contracted on its credit, or where the consideration goes to the benefit of such estate, or to enhance its value, equity will decree that it shall be paid from such estate or its income, to the extent to which the power of disposal by the married woman may go. *Rogers v. Ward*, 710.
 14. IN EQUITY, MARRIED WOMAN IS LIABLE ON HER BOND GIVEN FOR PRICE OF LAND conveyed to her for her sole and separate use, so far as she has the right to dispose of her separate estate, and a bill will lie to enforce payment therefor out of her separate estate, where no effectual remedy exists at law. *Id.*
 15. BILL IN EQUITY, SUFFICIENT ALLEGATIONS IN, TO ENFORCE PAYMENT OF MARRIED WOMAN'S BOND OUT OF HER SEPARATE ESTATE. — Where a bill in equity has been brought to enforce payment, out of the separate estate of a married woman, of a bond given by her for the price of land conveyed to her sole and separate use, it need not set out any specific estate or property belonging to the defendant in her own right, but may allege generally that she is possessed of property to her sole and separate use, and subject to her disposal, which is chargeable with the payment of the bond. *Id.*

16. MORTGAGE GIVEN BY MARRIED WOMAN TO SECURE PAYMENT OF HER BOND given for an estate conveyed to her own use, etc., in no degree affects or impairs the equity of the plaintiff to enforce payment for the property out of her separate estate. *Id.*
17. TRUSTEE IS NECESSARY PARTY TO BILL IN EQUITY to enforce payment of married woman's debt out of her separate estate, where it appears that her property is in the hands of a trustee. *Id.*
18. EQUITY HAS JURISDICTION, INDEPENDENT OF STATUTE, TO CAUSE MARRIED WOMAN'S SEPARATE ESTATE, so far as the *jus disponendi* is vested in her, to be applied in payment of debts contracted by her. *Id.*
19. EQUITY HAS JURISDICTION WHERE NO ADEQUATE AND COMPLETE REMEDY AT LAW EXISTS—SUCH REMEDY DOES NOT EXIST, WHEN.—Where it does not appear that the debt which plaintiff seeks to enforce against the separate estate of a married woman was contracted in this commonwealth, or is of such a nature that a married woman would be liable thereon, and her property be subject to attachment under our statutes, no adequate and complete remedy at law appears, and equity has jurisdiction. *Id.*
20. ALL PROPERTY THAT CAN BE SHOWN TO BELONG TO SEPARATE ESTATE OF WIFE, by satisfactory testimony, whether real, personal, or mixed, and all the rents, issues, profits, and increase thereof, are, under the constitution of California, sacred to the use and enjoyment of the wife, and cannot be held to answer for the debts of the husband. *Levie v. Johns*, 49.
21. NO LEGAL OR BENEFICIAL INTEREST IN TITLE, USE, OR ENJOYMENT OF WIFE'S SEPARATE PROPERTY passes to the husband, and her right of property therein after coverture is co-extensive with that which she possessed as a *feme sole*. *Id.*
22. LEGISLATURE MAY ENACT LAWS FOR FURTHER ASSURANCE OF WIFE'S RIGHT IN HER SEPARATE PROPERTY by throwing safe-guards around the *jus disponendi*, but cannot so legislate as to impair it in any degree. *Id.*
23. HUSBAND CANNOT ACQUIRE INTEREST IN SEPARATE ESTATE OF WIFE by any independent act of his, nor by his supervision or labor can he acquire any interest in the increase thereof. *Id.*
24. WIFE IS UNDER NO OBLIGATION TO COMPENSATE HUSBAND FOR HER SUPERVISION OR LABOR upon her separate property in the absence of an express agreement to that effect. *Id.*

See DOWER; HOMESTEADS.

MERGER.

See MORTGAGES, 14.

MINES AND MINING.

1. RIGHTS OF MINERS AND PERSONS OWNING DITCHES CONSTRUCTED FOR MINING PURPOSES are not paramount to all other rights and interests of a different character, regardless of the time or mode of their acquisition. *Wixon v. Water and Mining Co.*, 69.
2. PAROL LICENSE TO ENTER UPON AND MINE MINERAL LANDS, for a certain share of the mineral raised, for an indefinite time, and an entry under such license, and expenditure of labor and money in sinking shafts, running drifts, procuring machinery, and making other preparations for

mining under such license, will give to the licensee a valid subsisting interest in the real estate which the licensor can terminate only by giving him compensation for such expenditure, or the notice necessary to terminate a tenancy at will; and the licensee may assert his right to possession, against the licensor or his subsequent lessee with notice, by ejectment. *Beatty v. Gregory*, 546.

2. WHETHER INTEREST OF LICENSEE IN MINING LICENSE HAS BEEN FORFEITED, terminated, or abandoned, is a question of fact upon which the parties are entitled to the verdict of a jury. *Id.*
4. LESSEE OF MINERAL LANDS IS NOT BOUND BY PRIVATE CUSTOM OF LESSOR, unless the lease was executed with knowledge thereof by such lessee or his assignor. *Id.*
5. GENERAL ESTABLISHED CUSTOM OF MINERS enters into and forms part of a lease of mining lands, in the absence of any express stipulation to the contrary, or of a private custom, differing therefrom, which was known to both parties. *Id.*

See RIPARIAN RIGHTS, 1, 2, 5, 6.

MISTAKE

See SALES, 3; VENDOR AND VENDEE, 3, 4.

MORTGAGES.

1. RIGHT TO ENFORCE LIEN OF MORTGAGE IS BARRED BY STATUTE OF LIMITATIONS after the expiration of four years from the time when the right of action accrues on the debt secured by the mortgage. *Cunningham v. Hawkins*, 73.
2. ENTRY OF MORTGAGEE INTO POSSESSION OF MORTGAGED PREMISES cannot, as between him and the mortgagor, operate to extend the statutory period within which an action for the enforcement of the mortgage is barred. *Id.*
3. RIGHT OF MORTGAGOR TO MAINTAIN ACTION TO REDEEM PROPERTY FROM LIEN OF MORTGAGE is barred after the expiration of four years from the time when the right of action accrues on the mortgage debt. *Id.*
4. RIGHT OF ACTION FOR REDEMPTION OF MORTGAGED PROPERTY FROM LIEN OF MORTGAGE, when barred by the statute of limitations, cannot be revived by an offer of the mortgagor to pay the debt. *Id.*
5. MORTGAGEE'S RIGHT OF ACTION ON DEBT, AND TO ENFORCE MORTGAGE given to secure it, and the mortgagor's right of action for the redemption of the property from the mortgage lien, are mutual and reciprocal, and when one is barred by the statute of limitations, the other is also. *Id.*
6. CONVEYANCE OF MORTGAGED PREMISES BY MORTGAGOR TO MORTGAGEE IN SATISFACTION OF DEBT, is color of title; and if the grantee pays taxes on the land, while it is vacant, for more than seven years thereafter, this will constitute a good defense to a suit to redeem the premises by a person claiming by virtue of an execution sale and deed of the premises under a judgment rendered against the mortgagor before his conveyance to the mortgagee. *McCagg v. Heacock*, 327.
7. PURCHASER OF PORTION OF MORTGAGED PREMISES CANNOT REDEEM without paying the whole mortgage debt. *Street v. Beal*, 504.
8. SUBSEQUENT PURCHASERS AND ENCUMBRANCERS ARE PROPER BUT NOT NECESSARY PARTIES in foreclosure proceedings. *Id.*

9. FORECLOSURE SALE IS NOT INVALID BECAUSE PREMISES WERE NOT SOLD IN PARCELS, according to subdivisions made after the execution of the mortgage. *Id.*
10. MORTGAGE MADE TO SECURE INDEBTEDNESS CONTINUES TO STAND AS SUCH SECURITY, although the note or other paper which evidences the indebtedness may be taken up and other paper of the same party substituted therefor by way of renewal or otherwise. Equity holds the debt as the thing actually intended to be secured, and regards the note as merely the evidence of the debt. *Dumell and Wife v. Terstegege*, 466.
11. WHERE NOTE PRODUCED DOES NOT CORRESPOND WITH THAT DESCRIBED IN MORTGAGE, either by reason of a misdescription in the mortgage or in consequence of renewal of the paper originally secured, the complaint ought to contain specific averments connecting the note sued on with the mortgage given. *Id.*
12. COMPLAINT WHICH ALLEGES THAT DEFENDANT AND WIFE MADE MORTGAGE to secure the payment of a note, and that the note and mortgage are filed with the complaint, is not demurrable, although the note filed with the complaint is executed by the defendant and wife and does not bear interest, while the mortgage describes a note of the same date executed by the defendant alone, bearing interest from date. Such allegation will admit whatever proof may be necessary to show that the note exhibited is the one which was secured by the mortgage. *Id.*
13. MORTGAGEE, INDUCED BY MORTGAGOR'S FRAUDULENT REPRESENTATIONS TO SURRENDER HIS MORTGAGE, MAY KEEP IT ALIVE, in equity, and enforce it, as though the surrender had not been made, as against the mortgagor, and those claiming under him, who do not part with consideration upon the faith of the discharge, and are not prejudiced thereby. *Vannice v. Bergen*, 531.
14. MERGER DOES NOT OCCUR WHERE MORTGAGEE PURCHASES EQUITY OF REDEMPTION, if it is to the interest of the mortgagee to keep the mortgage alive, and this can be done without prejudice to the rights of the mortgagor or of third persons. *Id.*
15. MORTGAGEE OF LAND MAY RELEASE PART THEREOF FROM OPERATION OF HIS MORTGAGE without impairing his security upon the remainder, if, at the time he executes such release he has no notice, actual or constructive, of a prior conveyance of a portion of such remainder, made by the mortgagor to a third person; and the record of such prior conveyance is not constructive notice thereof to him. *George v. Wood*, 741.
16. RIGHT TO CONTRIBUTION FROM SUBSEQUENT GRANTEE OF PORTION OF MORTGAGED PREMISES cannot be settled in a suit in equity to redeem from the mortgage, unless such grantee is made a party to the bill. *Id.*
17. PROCEEDS ARISING FROM FORECLOSURE SALE UNDER MORTGAGE executed to secure several notes maturing at different times, should, in absence of any other binding agreement, be applied to the payment of the notes in the order in which they fall due, whether in the hands of an original payee or an assignee, and without reference to the order or time of their assignment. *Isett and Brewster v. Lucas*, 572.
18. PAROL EVIDENCE IS NOT ADMISSIBLE TO ALTER OR VARY LEGAL EFFECT OF MORTGAGE. *Id.*
19. APPLICATION OF SURPLUS PROCEEDS OF SHERIFF'S SALE. — Where a decree in foreclosure ordered a sale of so much of the mortgaged premises as should be necessary to satisfy the mortgage debt, and a special execution commanded the sheriff to expose the whole property for sale, under

which it was divided into five parcels which were sold separately, the fifth one being sold after a sum had been realized from the sale of the other four sufficient to satisfy the debt, a motion in court by a subsequent lien-holder to apply the surplus thus arising operated as an affirmation or ratification of the sale, and on the hearing of the motion the sale would be treated as valid. *Poll v. Sypher*, 568.

20. **SURPLUS MONIES ARISING FROM FORECLOSURE SALE**, while remaining in the hands of the sheriff, or under control of the court, belong to subsequent lien-holders in the order of priority, and should be so disposed of by the court; but when the execution does not direct the disposition of such surplus, and the sheriff, acting in good faith and without knowledge of such subsequent liens, applies the money upon other executions in his hands against the mortgagor, he will not be liable to such lien-holders therefor. *Id.*
- See **ALTERATION OF INSTRUMENTS**; **DOWER**; **ESTOPPEL**, 11; **HOMESTEADS**, 8, 10, 11; **MARRIED WOMEN**, 2, 16; **PLEADING AND PRACTICE**, 6; **POWERS**, 1; **RES ADJUDICATA**, 4; **STATUTE OF FRAUDS**, 5, 6; **VENDOR AND VENDEE**, 7, 8; **WRITS OF ASSISTANCE**.

MUNICIPAL BONDS.

See **CORPORATIONS**, 8, 9; **NEGOTIABLE INSTRUMENTS**, 12.

MUNICIPAL CORPORATIONS.

See **CORPORATIONS**, 8-21; **HIGHWAYS**; **NEGLECTENCE**, 4-7; **NEGOTIABLE INSTRUMENTS**, 12; **SEWERS**.

MURDER.

See **CRIMINAL LAW**, 2-10.

NAVIGABLE WATERS.

See **FISHERY**.

NEGLECTENCE.

1. **PLAINTIFF IN ACTION FOR NEGLIGENCE CANNOT RECOVER UNLESS HE WAS HIMSELF USING DUE CARE** at the time he received the injury, even if the carelessness of the defendants occasioned it. And the burden of proof is upon him to show that he used such care. *Warren v. Fishburg R. R. Co.*, 700.
2. **VERDICT MAY BE DIRECTED FOR DEFENDANT** if the whole evidence introduced by the plaintiff has no tendency to show care on his part, but, on the contrary, shows that he was careless. *Id.*
3. **FACTS AS TO NEGLIGENCE WHICH COURT CANNOT RIGHTFULLY WITHDRAW FROM CONSIDERATION OF JURY.** — Crossing a railroad track without looking to see if a train is coming is not conclusive proof of a want of care, where it appears that there is a double track, that the person injured had just bought a ticket at a station for a train which was to pass upon the farther track, and that the station agent said to him, "The train is coming; we will cross over." *Id.*
4. **OWNER OF BUILDING IS BOUND TO INDEMNIFY TOWN FOR DAMAGES** recovered against it for injuries sustained by a third person by reason of the defective and unsafe condition of an awning extending across the sidewalk along the whole front of the building, the lower story of which

is occupied by shops, for the advantage of which such awning was built and maintained, where the owner has leased the whole of the lower story and a part of the upper story, but has himself remained in possession of the residue of the upper story, there being no express agreement with the tenants that they should keep the awning in repair. *Inhabitants of Milford v. Holbrook*, 735.

8. **NOTICE BY TOWN TO OWNER OF BUILDING OF ACTION BROUGHT AGAINST IT** to recover damages for an injury sustained on the sidewalk in front of his building is sufficient, where it describes the building and requests him to defend the action, and states that if the town is liable he will be responsible to it, because the injury, if it occurred, must have occurred through his negligence. *Id.*
9. **OWNER OF BUILDING WHO IS ALSO OCCUPANT OF PART OF IT IS LIABLE FOR INJURY** resulting from his failure to keep in repair an awning extending the whole length of the building, although there be no agreement between him and the tenants of the residue of the building that he should keep the awning in repair. *Id.*
10. **JUDGMENT RECOVERED BY THIRD PERSON AGAINST TOWN FOR INJURIES SUSTAINED BY REASON OF DEFECTIVE AWNING** over the sidewalk is conclusive upon the owner of the awning bound to keep the same in repair, and who has had notice of the pendency of the action, and that the town would hold him to answer over, upon the points that the awning was defective, that the person suffered injury while exercising due care, and that he suffered damage to the amount of the judgment. *Id.*
11. **ESCAPE OF GAS, CAUSING INJURY TO HEALTH, EVIDENCE ADMISSIBLE WITH RESPECT TO.** — In an action against a gas-light company to recover damages for an injury to the plaintiff's health, caused by an escape of gas from the main pipe in a public street, which passed therefrom through various sewers and drains into the cellar of the house, and thence into the house occupied by the plaintiff, evidence is competent to show that all the other persons living in the same house, who had been in good health before the time complained of, afterwards became ill, for the purpose of showing the effect of the gas upon others who inhaled it at the same time with the plaintiff. *Hunt v. Lowell Gas Light Co.*, 697.
12. **SAME.** — EVIDENCE THAT INMATES OF ANOTHER HOUSE WERE MADE SICK in consequence of inhaling gas that escaped from the same defect in the defendant's pipes, is not admissible for plaintiff in an action to recover for injuries caused by the escape of gas into his own house. The evidence must be limited to the effect of the gas upon those who have in common, and under similar circumstances, inhaled it. *Id.*
13. **GAS-LIGHT COMPANY IS EQUALLY LIABLE FOR INJURY CAUSED BY ESCAPE OF GAS** from the main pipe in a public street, and passing therefrom through various sewers and drains into the plaintiff's house, whether the injury was caused by inhaling gas of the defendants, or other gases from the sewers and drains which it set in motion, provided the plaintiff was not, and the defendants were, guilty of negligence. The defendants' negligence in such a case is as much the proximate cause of the injury as if their own gas had occasioned it. *Id.*
14. **VERDICT MAY BE DIRECTED FOR DEFENDANT WHEN.** — Where admitted or uncontroverted facts of case show that the acts and conduct of a plaintiff at the time of an alleged injury, and contributing to produce it, are such as to indicate, according to the common experience and observation of mankind, a want of due and reasonable care, adapted to the cir-

circumstances in which he is placed, he does not show any legal cause of action, and it is the duty of the court, in such a state of the proof, to direct a verdict for the defendant. *Snow v. Housatonic R. R. Co.*, 720.

12. **FACTS PROPER FOR SUBMISSION TO JURY AND NOT TO BE RULED CARELESS AS MATTER OF LAW.** — Where the duty of a servant of a railroad company requires him to uncouple the cars of a train, which is ordinarily done while the train is in motion, thereby loosening the bolt sufficiently to enable it to be withdrawn from its socket, and which cannot be done while the train is standing still, and he, in endeavoring to uncouple them while the train is in motion, steps between the cars, but meets with an injury caused by a want of repair of the road-bed of the railroad, the court cannot rule, as a matter of law, that he was careless, and should submit the question to be determined by the jury; although he continued in the employment of the company after he knew of the defect. *Id.*
 13. **AVERTMENT OF COMPLAINT IN ACTION AGAINST RAILROAD COMPANY FOR DAMAGES** resulting from the negligence of its agents and servants, that the defendant ran its train with carelessness and gross negligence, is good on demurrer. *Ohio and Mississippi R. R. Co. v. Davis*, 477.
- See **COMMON CARRIERS; CORPORATIONS, 7; HIGHWAYS, 2; MASTER AND SERVANT; RAILROADS; RECEIVERS, 1.**

NEGOTIABLE INSTRUMENTS.

1. **INLAND BILL OF EXCHANGE, WHAT IS.** — Instrument in following words: "Cincinnati, September 18, 1855. Thomas Williams, Esq.: Please let the bearer have fifty dollars. I will arrange it with you this noon. Yours, most obedient, S. R. Biesenthal," — is an inland bill of exchange, and not a covenant, and is barred by the five years' limitation. *Biesenthal v. Williams*, 629.
2. **BILL OF EXCHANGE DRAWN IN ONE OF UNITED STATES, upon a person residing in any other of them, partakes of the character of a foreign bill, and ought so to be treated.** *Mason v. Douay*, 268.
3. **WHERE ALL FACTS CONNECTED WITH INLAND BILL OF EXCHANGE ARE TO TRANSPIRE IN SAME STATE, the law of that state should be applied to ascertain the rights of the parties.** *Id.*
4. **LAW OF PLACE OF PERFORMANCE GOVERNS, in relation to contracts made in one place, to be executed in another.** *Id.*
5. **IT IS PRESUMPTION OF LAW THAT PARTIES TO CONTRACT MADE IN ONE PLACE to be performed in another know the law of the place in which the paper is payable, and that they intend this law shall govern the contract.** *Id.*
6. **HOLDER OF BILL OF EXCHANGE MUST PRESENT IT IN REASONABLE TIME to the party on whom it is drawn, at his place of business.** *Id.*
7. **PAROL ACCEPTANCE OF BILL OF EXCHANGE IS VALID IN ILLINOIS, and is binding upon the acceptor.** *Id.*
8. **WHERE DEFENDANT CAN RESORT FOR DEFENSE TO LAW OF ANOTHER STATE, he should plead and prove such foreign law.** *Id.*
9. **NEGOTIABLE NOTE AT COMMON LAW IS ONE PAYABLE TO ORDER OR BEARER; and such note may have a bona fide holder who has honestly received it for a consideration, ignorant of any vice in its original execution, and against whom such vice cannot be set up as a defense to a suit thereon.** *Muselman v. McElhenny*, 445.

10. IN INDIANA, NOTES, UNLESS PAYABLE AT BANK IN THAT STATE, CANNOT HAVE BONA FIDE HOLDER, as to defenses, although they are so far negotiable as to be transferable and suable by the holder. *Id.*
11. MAKER OF NOTE NOT MADE PAYABLE AT BANK IN INDIANA MAY BE ESTOPPED by his own acts from setting up defenses against a *bona fide* holder of it, notwithstanding he could not, by the law merchant, be prevented from setting up such defenses. *Id.*
12. BONDS AND COUPONS ISSUED IN PAYMENT OF SUBSCRIPTION OF MUNICIPAL CORPORATION to capital stock of a railroad company, in the form set out in this case, are legal promissory notes, and are governed by the law merchant. *City of Aurora v. West*, 413.
13. NEGOTIABLE INSTRUMENTS ARE GOVERNED BY LAW OF PLACE where they are expressly made payable. *Id.*
14. MERCANTILE PAPER MADE VOID AS LIMITED BY STATUTE is void in the hands of a *bona fide* holder. *Id.*
15. MAKER OF NOTE NOT GOVERNED BY LAW MERCHANT CANNOT SELL IT for a price less than that expressed on its face, so as to preclude himself from setting up want of consideration to the extent of the discount, unless, perhaps, where the sale was by agent, a possible case of estoppel may be created. *Musselman v. McElhenny*, 445.
16. DRAWER OF DRAFT OR CHECK MUST HAVE DUE NOTICE OF ITS DISHONOR, according to the rules of mercantile law, before he can be held liable for non-acceptance or non-payment. *Lawrence v. Schmidt*, 371.
17. DRAWER OF DRAFT OR CHECK MAY WAIVE NOTICE OF ITS DISHONOR, or may so act as to amount to a waiver of notice, and when he has not drawn against funds, the necessity for notice does not exist. *Id.*
18. PARTY WHO DRAWS UPON ANOTHER MUST PROVIDE FUNDS, and the kind of funds for which he draws, and failing so to do, it is the same as if no funds were provided. *Id.*
19. HOLDER OF CHECK DRAWN FOR CURRENT FUNDS, is not bound to receive depreciated paper. *Id.*
20. HOLDER OF CHECK CALLING FOR GIVEN NUMBER OF DOLLARS, without designating what character of funds are drawn for, is entitled to demand payment in money, and is not bound to receive depreciated currency. *Id.*
21. HOLDER OF SIGHT DRAFT MUST PUT IT INTO CIRCULATION, OR PRESENT IT FOR PAYMENT, at the farthest, on the next business day after its reception, if within reach of the person upon whom it is drawn, in order to charge the drawer and indorsers. *Strong v. King*, 336.
22. SIGHT DRAFT MATURES WHEN PRESENTED FOR PAYMENT, and if presented on the day of its reception, and not then paid, it must be protested for non-payment on the same day, and due notice given, in order to charge the drawer and indorsers, precisely as if it had been made payable on a specified day. *Id.*
23. SIGHT DRAFT, LIKE ALL OTHER BILLS, SHOULD BE PRESENTED FOR PAYMENT BY HOLDER, or his agent, during the business hours of the day; but after such presentation, it may be again presented by a notary, for the purpose of making a protest for non-payment, after business hours, on the same day. *Id.*
24. IF HOLDER OF SIGHT DRAFT, ON PRESENTING IT, FINDS NO ONE AT DRAWEE'S PLACE of business to honor it, he may elect to consider the bill as not presented for payment; but any act evincing an election to consider it as presented for the purpose will bind the holder, and he can-

- not, after such election, claim that the bill was not presented for payment. *Id.*
29. **BARE RECEPTION OF CHECK FROM DRAWER FOR AMOUNT OF BILL** will not, ordinarily, be considered as a payment, but only as a means of payment; and this is so, whether the bill is surrendered to the drawee at the time of receiving the check, or is retained by the holder until payment is consummated. *Id.*
30. **ACCEPTANCE OF CHECK FROM DRAWER OF BILL** may be shown to have been in absolute payment. *Id.*
31. **APPROPRIATION OF CHECK BY HOLDER TO OWN USE**, by putting it in circulation, becomes a payment of the bill for which it was received. *Id.*
32. **WHETHER CHECK WAS DEPOSITED WITH BANKER AS MONEY OR FOR COLLECTION**, is a question of fact. If deposited in the usual course of business, the presumption is, that it was for collection merely, and not as money. *Id.*
33. **CHECK DEPOSITED AS MONEY OPERATES AS PAYMENT** of the bill for which it was given from the moment the deposit is made. *Id.*
34. **HOLDER OF CHECK MAY AS WELL EMPLOY HIS BANKER, AS AGENT**, to collect it as any other person; and if the holder deposits the check with his banker for collection, such deposit is the same, in legal effect, as handing the check to a messenger for the same purpose. *Id.*
35. **DEPOSIT OF CHECK FOR COLLECTION DOES NOT OPERATE AS PAYMENT OF BILL** for which the check was given. *Id.*
36. **HOLDER OF CHECK OUGHT TO PRESENT IT FOR PAYMENT** before the expiration of the next business day after it is received, in order to avoid loss by the failure of the drawee. *Id.*
37. **TIME WITHIN WHICH CHECK MUST BE PRESENTED TO CHARGE DRAWER** in no wise regulates or fixes the time when a protest must be made in order to charge the drawer or indorser of a bill for which the check was received as a means of payment. *Id.*
38. **PARTY RECEIVING CHECK AS MEANS OF PAYMENT MUST PROCURE ITS PAYMENT** on the day of its reception, or return it for non-payment on that day, so as to have the bill for which it was received protested for non-payment on that day. *Id.*
39. **CONSEQUENCES OF NEGLECT TO PROTEST BILL MAY BE WAIVED** by person entitled to take advantage of it; and a promise to pay the bill, made by the person insisting upon the want of protest, after he is aware of the laches, to the holder, amounts to a waiver of such laches, and admits the holder's right of action. *Id.*
40. **MAKER OF NOTE PAYABLE IN PROPERTY MUST DELIVER PROPERTY, OR TENDER IT AT TIME AND PLACE SPECIFIED**, it seems, in order to discharge himself from his obligation; but a demand of the property by the payee, after maturity, is a waiver of a previous breach by the maker, and affords him a second opportunity to deliver or tender the property. *State v. Shupe*, 485.
41. **WHERE PLAINTIFF ASSIGNED NOTE PENDING ACTION**, and he and his assignee filed an amended petition alleging that fact: *Held*, that a judgment in favor of the plaintiff was a clerical misprision, and besides, was not prejudicial to the defendant. *Cooper v. Poston*, 610.
42. **WHERE ONLY DEFENSE TO ACTION ON NOTE IS USURY**, and the verdict was, "We, of the jury, find for the plaintiff," a judgment rendered against the defendant for the amount of the note with interest is proper. *Id.*

39. NOTES EXHIBITED WITH PETITION AGAINST DEFENDANTS CONSTRUCTIVELY SUMMONED ARE PRIMA FACIE GENUINE, and require no other proof *abunde* of their genuineness. *Buchner v. Bank*, 634.
 40. ACCEPTOR OF DRAFT IS REGARDED IN SAME LIGHT AS MAKER OF PROMISSORY NOTE, and is primarily liable thereon. *Kugler v. Bank of Galena*, 309.
 41. DRAWER OF BILL OF EXCHANGE MUST PAY IT IF DRAWER DOES NOT, where his liability has been properly fixed, and no written promise on his part is necessary as in the case of a guaranty. *Id.*
 42. LIABILITY OF DRAWER ON BILL OF EXCHANGE where he has funds in the hands of the drawee is fixed, when the bill is duly presented to the drawee and payment refused, and the drawer duly notified of the refusal. *Id.*
 43. DRAWER HAVING NO FUNDS IN HANDS OF DRAWER NOT EXPECTATION OF ANY is not entitled to notice of the refusal of payment by the drawee. *Id.*
 44. DRAWER IS BOUND BY PROMISE TO PAY DRAFT made with knowledge of non-acceptance by the drawee. *Id.*
 45. PROMISE BY DRAWER TO PAY EXISTING BILL AMOUNTS IN LAW TO ACCEPTANCE, whether the bill was taken upon the faith of the promise or not; and a promise to any person interested in having the bill paid inures to the benefit of the holder. *Jones v. State Bank*, 306.
 46. DRAWER IS NOT EXCUSED FROM ACCEPTING AND PAYING BILL in accordance with terms of his agreement, because of the non-performance of an agreement by the drawer, made at the same time, that the net proceeds of certain property transferred to the drawee shall amount to a certain sum. *Id.*
 47. IT MUST BE PRESUMED IN BEHALF OF ASSIGNEE OF NOTE that the payer and payee are different persons, when they are of the same name. The legal presumption is in favor of the validity of the contract. *Cooper v. Poston*, 610.
 48. IN ACTION ON NOTE BY ASSIGNEE THEREOF, PLAINTIFF NEED NOT AVER that the defendant and payee are different persons. The fact that they are the same person is matter of defense properly coming from the other side. *Id.*
 49. WHERE DECLARATION IN ASSUMPSIT ON PROMISSORY NOTE counts specially on the note, and also contains the common counts, a general demurrer thereto must be overruled, if the common counts are good, whatever may be the character of the special count. *Nickerson v. Sheldon*, 280.
 50. PROMISSORY NOTE IS EVIDENCE, under the common counts in *assumpsit*, in the assessment of damages, without proving any consideration. *Id.*
 51. PROMISSORY NOTE REMAINS NEGOTIABLE when the following additional clause is inserted: "We further agree that if the above note is not paid without suit, to pay ten dollars in addition to the above, for attorney's fees," because the amount to be paid remains absolutely certain. *Id.*
- See ACCORD AND SATISFACTION; BANKS AND BANKING; ESTOPPEL, 11; STATUTE OF LIMITATIONS, 3; USURY, 4, 5; USAGE.

NOTICE.

See ATTORNEY AND CLIENT, 4; DEEDS, 6; EXEMPTIONS, 14; INSURANCE, 8, 9; JUDGMENTS, 5, 6, 24; RAILROADS, 1.

NUISANCES.

See CORPORATIONS, 19.

OFFICE AND OFFICERS.

1. COURT WILL PRESUME THAT OFFICER HAS PERFORMED HIS DUTY. — So held when the record is silent as to whether a constable gave due notice of a sale, by advertising it as required, or not. *Culbertson v. Mithollen*, 428.
2. TERMS "OFFICE" AND "PUBLIC TRUST" AS USED IN SECTION 3, ARTICLE 11, OF CONSTITUTION OF CALIFORNIA, prescribing the oath to be taken as a qualification for any office of public trust, have relation only to those persons and duties that are of a public nature. *Ex parte Yale*, 62.
3. ATTORNEY AT LAW IS NOT "OFFICER," AND DOES NOT HOLD "PUBLIC TRUST" in the constitutional sense of those terms. *Id.*
4. IN INDIANA, IN ACTION AGAINST COUNTY TREASURER AND HIS SURETIES to recover money due the state, the auditor, and not the treasurer of state, should be relator. *Pepper v. State ex rel. Harvey*, 430.
5. DRAFT OF OFFICIAL BOND, IN BODY OF WHICH CERTAIN NAMES ARE INSERTED AS OBLIGORS, if afterwards signed by only part of the persons whose names so appear, will not become binding upon them until it is executed by all, on the ground that the presentation of such bond, so prepared, to such persons (named in it) as signed it, amounted to a representation that all the persons named in it would sign it before its delivery. *Id.*
6. WHEN DRAFT OF OFFICIAL BOND, IN BODY OF WHICH CERTAIN NAMES ARE INSERTED AS OBLIGORS, is presented to one of such persons for his signature by the principal in the bond, and such person signs it, there being several signatures attached to it already, and it afterwards appears, from some cause, that the bond is not binding on some or any of the persons whose names preceded his, it should be held not binding upon him, unless it be shown that he had knowledge of its invalidity as to the others at the time he signed it. *Id.*
7. WHEN DRAFT OF OFFICIAL BOND IS PRESENTED BY PRINCIPAL IN IT TO SEVERAL PERSONS, and their signatures as sureties for him are solicited by him, and he represents to them severally that before its delivery he will procure the signatures of a certain number of other persons as sureties, or of certain named persons, and some of them are induced by such representations to sign it, and others sign it upon condition that such other signatures shall be procured, and such other signatures are not procured, these several classes of persons, in defense to an action upon such bond, may show these facts. *Id.*
8. OFFICIAL BOND OF COUNTY TREASURER MUST, IN INDIANA, BE APPROVED AND ACCEPTED by the board of commissioners of the county, and if such board appoints no person as agent to procure its due execution, and on its presentation institutes no examination into the mode of its execution, or the sufficiency thereof, it is reasonable to assume that such board accepted it upon the faith of the fair dealing of the principal in procuring its execution, and thus far at least adopted his acts as their own, and as a substitute for the inquiry they should have instituted on its presentation for their approval. *Id.*

See ATTACHMENTS; EVIDENCE, 11; SHERIFFS; SURETYSHIP, 1.

PARENT AND CHILD.

See ABDUCTION; ALIENS; HOMESTEAD, 12.

PARTNERSHIP.

1. PERSON CANNOT BE ESTOPPED FROM DENYING THAT HE IS MEMBER OF FIRM by the representations of one who is merely the agent of the firm. *Plumer v. Lord*, 773.
2. SEPARATE CREDITOR OF INDIVIDUAL SURVIVING PARTNER may attach by way of execution a debt due the partnership, of which that individual was a member, before a settlement of the partnership, and ascertainment of the debtor partner's interests. *Berry v. Harris*, 639.
3. EACH PARTNER MUST EXONERATE the other from a moiety of a joint debt. No act falling short of a complete exoneration of one partner and his property from so much of the liability as he is entitled to be exonerated from, will operate as a discharge of the other from his obligation in that regard. *Downs v. Jackson*, 239.
4. SALE EN MASSE OF LANDS belonging to partners in severalty for the discharge of a joint partnership debt does not discharge any part of the property sold nor the parties from their respective duties, namely, to each pay a moiety of the debt. *Id.*
5. WHERE THERE IS SALE EN MASSE of lands belonging to partners in severalty to discharge a joint partnership debt, neither can obtain a discharge of his property without paying the whole amount of the purchase-money with interest, and each of them has the same right after the sale, within the time allowed to redeem the lands for that purpose as he had before that time to pay the debt to discharge himself from personal liability. *Id.*
6. WHERE LANDS OWNED BY PARTNERS IN SEVERALTY are sold en masse under execution to discharge a partnership debt, and one of the partners redeems the lands, he is entitled in equity to recover from the other one moiety of the money paid by him with interest thereon from the time of its payment. *Id.*

See INSURANCE, 14.

PAYMENT.

See ACCORD AND SATISFACTION; AGENCY; COLLATERAL SECURITY; MORTGAGES, 6; RES ADJUDICATA, 1, 2.

PERJURY.

See CRIMINAL LAW, 11.

PLEADING AND PRACTICE.

1. THERE IS MISJOINDER OF PARTIES WHERE HUSBAND AND WIFE ARE SUED, and no cause of action is shown against her. *MacKay v. Lee*, 133.
2. AFFIDAVIT FOR CONTINUANCE IN IOWA, FOR ABSENCE OF WITNESS, MUST STATE his name and residence, and the facts showing the probability of procuring his testimony at the next term, the facts showing due diligence to obtain the witness or his testimony, and the facts to be proved by him. *State v. Shupe*, 485.
3. AFFIANT IS GUILTY OF PERJURY IF HE WILLFULLY STATES IN AFFIDAVIT FOR CONTINUANCE MATTERS which are false and material to the establishment of one of the essential parts of such affidavit, although the matters stated as to the other parts are wholly immaterial. *Id.*

4. AS GENERAL RULE, PLAINTIFF NEED NOT ANTICIPATE MATTERS OF DEFENSE, and is required only to state facts which constitute, *prima facie*, a cause of action. *Cooper v. Poston*, 610.
5. ANSWER SETTING UP FORMER ADJUDICATION MUST BE ACCOMPANIED BY COMPLETE RECORD of all the pleadings and proceedings in the case upon which it is founded, and if it fails to do this, the defect may be reached by demurrer. *Williamson v. Foreman*, 475.
6. ANSWER TO BILL TO FORECLOSE MORTGAGE DENYING THAT ALTERATIONS IN MORTGAGE NOTES were made by the consent of the parties, as alleged in the bill, but not averring that they were fraudulently made, does not put in issue the intention with which they were made, and the court will not consider the evidence in regard to it. *Vogle v. Ripper*, 298.
7. JUDGMENT WILL NOT BE REVERSED BECAUSE DEMURRER HAS BEEN IMPROPERLY SUSTAINED to special pleas, where the appellant has had the full benefit of the matters set up in the special pleas, they having been given in evidence under the general issue. *Jones v. State Bank*, 306.
8. COMPLAINT CANNOT BE AMENDED IN SUPREME COURT so as to make it correspond with the verdict; but the district court, in a proper case, may before judgment direct the complaint to be so amended. *Hooper v. Wells, Fargo, & Co.*, 211.
9. PLAINTIFF IS NOT ENTITLED TO JUDGMENT ON PLEADINGS, where the defendant denies the right of the plaintiff, and sets up title in himself. *Union Water Co. v. Crary*, 145.
10. MATTERS NOT EMBRACED IN GROUNDS OF APPEAL SET FORTH IN STATEMENT ON APPEAL will not be noticed by the appellate court. *Wison v. Bear River etc. M. Co.*, 69.
11. STIPULATION BETWEEN ATTORNEYS FOR PLAINTIFF AND DEFENDANT THAT ANNEXED STATEMENT is a correct statement on motion for new trial, that upon it plaintiff's motion for a new trial was refused, also that it contains the judgment roll, orders and instructions given by the court, and shall be used on appeal without further certificate or identification, cures all technical objections to the transcript; and where no notice of motion for new trial appears, the court will presume that one was regularly given. *Godchtus v. Musford*, 178.
12. COMPLAINANT HAS RIGHT TO HAVE NOTICE UPON RECORD, in a precise and unambiguous manner, of the conclusions of fact intended to be drawn from allegations in the answer. *Vogle v. Ripper*, 298.
13. EXCEPTIONS TO CHARGE OF COURT SHOULD POINT OUT specific portions of the charge excepted to, and should be made at the time of the trial, before the jury retires, so that the judge may have an opportunity to correct errors. *Hicks v. Coleman*, 108.
14. CAUSE WILL NOT BE REVERSED ON APPEAL FOR ERROR IN PERMITTING QUESTION TO BE PUT AND ANSWERED, where the answer is harmless; nor where, though not harmless, no motion for a new trial, on account of the error, was interposed. *City of Aurora v. West*, 413.
15. NEW TRIAL SHOULD BE HAD UPON QUESTION OF DAMAGES ONLY, where the exceptions which are sustained relate to that question solely. *Kent v. Whitney*, 739.
16. ERROR IN ADMITTING TESTIMONY MAY BE CURED BY INSTRUCTIONS to the jury to disregard such testimony; and when so cured, the error is not sufficient to entitle the objecting party to a new trial. *Union Water Co. v. Crary*, 145.

17. **NEW TRIAL WILL NOT BE GRANTED**, when it is apparent that the verdict on re-trial must be the same as on the former trial, although the court below may have erred as to some of the instructions given. *McConnel v. Kibbe*, 265.

See **CRIMINAL LAW**; **DAMAGES**, 4-11; **EQUITY**; **ESTOPPEL**; **EVIDENCE**, 16; **HIGHWAYS**, 12; **JUDGMENTS**, 15-22; **MORTGAGES**, 12; **NEGOTIABLE INSTRUMENTS**, 43, 49; **REALTY**, 1; **REPLEVIN**; **RES ADJUDICATA**, 2, 2.

PLEDGE.

PLEDGER'S RIGHT IS SUPERIOR TO LIEN OF EXECUTION LEVIED UPON PROPERTY PLEDGED, by an officer who had notice of the pledge. *Reese v. Sebern*, 512.

See **COLLATERAL SECURITY**.

POSSESSION.

1. **PRESUMPTION OF OWNERSHIP ARISING FROM POSSESSION OF HORSE** is overcome by the unexplained existence of the government brand upon the horse. *Bergen v. Riggs*, 304.
2. **POSSESSION OF CHATTELS CREATES PRESUMPTION OF OWNERSHIP**; but the *prima facie* case may be rebutted by circumstances attending the possession, or by positive proof. *Id.*
3. **WHERE DEFENDANT'S POSSESSION OF PERSONAL PROPERTY IS ACCOMPANIED BY SUCH CIRCUMSTANCES** as rebuts the presumption of ownership, it is error to instruct the jury, in an action for breach of implied warranty of title on a sale thereof, that possession is *prima facie* evidence of ownership, and that the burden is upon the plaintiff to prove title in another, such instruction being calculated to mislead. *Id.*
4. **ACTUAL OCCUPANCY OF PART OF TRACT OF LAND AMOUNTS TO POSSESSION OF WHOLE TRACT WHEN**. — Where one enters into actual possession of a part of a tract of land, claiming the whole under a deed in which the entire tract is described by metes and bounds, his possession is not limited to the part actually inclosed, but extends to every part of the entire tract not in the adverse possession of another person at the time of his entry. And this rule applies to small as well as large tracts of land. *Hicks v. Coleman*, 103.

See **WRITE OF ASSISTANCE**.

POWERS.

1. **MORTGAGEE, IN EXERCISING POWER OF SALE IN MORTGAGE OF PERSONAL PROPERTY, MAY ADJOURN SALE** from time to time, in the exercise of a reasonable discretion, without doing so through the agency of a licensed auctioneer or giving any new notice to the mortgagor. *Hoemer v. Sargent*, 638.
2. **PURCHASER OF PROPERTY UNDER SALE IN PURSUANCE OF POWER** is chargeable with notice of the extent of the power, and is bound to see that it has been pursued. *Sears v. Livermore*, 564.
3. **IN ASCERTAINING WHETHER POWER HAS BEEN PROPERLY EXERCISED OR FOLLOWED**, no question of jurisdiction is involved as in cases of judicial sales. *Id.*
4. **DIRECTIONS IN POWER OF SALE MUST BE STRICTLY PURSUED**, and a deviation in the execution of the power will invalidate the sale. *Id.*

5. WHERE DEED CONTAINING POWER OF SALE provided that notice should be given by posting on the front door of a certain hotel, a posting of such notice near the door but not on it is not a sufficient compliance with the power; and the fact that the proprietor of the hotel refused to permit the posting of such notices on the door of his house would afford no excuse for disregarding the terms of the power. *Id.*

See AGENCY, 2.

PRINCIPAL AND AGENT.

See AGENCY.

PROBATE COURTS.

See ESTATES OF DECEDENTS; EXECUTORS AND ADMINISTRATORS.

PROCESS.

1. ALLEGATION THAT DEBTOR HAD BEEN MORE THAN THIRTY DAYS VOLUNTARILY WITHIN CONFEDERATE LINES may be taken for confessed, if supported by the proper affidavit. *Buckner v. Bush*, 634.
2. PROPERTY SEIZED UNDER FIERI FACIAS ISSUED FROM UNITED STATES CIRCUIT COURT cannot be replevied by process issued from a state court. *Munson v. Harroun*, 316.
3. STATE COURT CANNOT LAWFULLY INTERFERE WITH EXECUTION OF FINAL PROCESS OF FEDERAL COURT for the protection of a stranger alleging that his property has been tortiously seized in execution to satisfy the debt of another. A remedy affecting the custody of the property, such as replevin, is exclusively within the jurisdiction of the federal court, though trespass or trover will lie in the state court against the marshal or his deputy for the wrongful seizure. *Id.*

See JUDGMENTS, 23, 25.

PUBLIC LANDS.

1. PURCHASER OF LAND FROM GOVERNMENT IN PURSUANCE OF LAW, upon receiving a certificate of purchase, acquires the equitable title to the premises to the same extent that he would by a purchase from an individual owning the fee. *Brill v. Stiles*, 364.
2. SAME RULES APPLY IN DETERMINING UPON VALIDITY OF TITLE derived from the government as when derived from an individual. *Id.*
3. JUNIOR PATENT FROM GOVERNMENT, OR REGISTER'S CERTIFICATE OF ENTRY, WILL PREVAIL in equity over the elder one, if the right on which it is based is prior in point of time to that upon which the elder patent or certificate is founded. *Id.*
4. CERTIFICATE OF ENTRY WILL PREVAIL IN EQUITY OVER PATENT based upon a subsequent entry, unless the prior equity has been legally vacated. *Id.*
5. DETERMINATION OF COMMISSIONER OF GENERAL LAND-OFFICE, in reference to the validity of a sale of the public lands, concludes no one in his rights. *Id.*
6. ONE WHO, WITH FULL KNOWLEDGE OF FACTS, MAKES ENTRY UPON AND OBTAINS PATENT for public land upon which a prior entry has been made, which has been canceled by mistake, will hold the legal title in trust for the prior entryman or his assignee. *Forbes v. Hall*, 301.

7. ENTRY ON PUBLIC LAND CANCELED BY MISTAKE IS, if not abandoned, in full force when the mistake is corrected, and a subsequent entry with notice cannot defeat it. *Id.*
8. LAND-OFFICERS CANNOT, BY ANY ACT OF THEIRS, DIVEST EQUITY OF PRIOR ENTRYMAN without his consent. *Id.*
9. ONE FRAUDULENTLY MAKING SECOND ENTRY ON PUBLIC LANDS has no claim against prior entryman for purchase-money and taxes paid. *Id.*
10. RELATIVE RIGHTS OF OCCUPANCY OF ISLAND FOR GATHERING EGGS OF WILD BIRDS. — Persons who casually and temporarily occupy an island, a part of the public domain, not for purposes of husbandry, residence, or commerce, but to engage in the pursuit of hunting, fishing, or gathering the eggs of wild birds deposited there, have no such possession of the same as will entitle them to exclude others who wish to occupy it for a similar purpose, or justify them in forcibly resisting others who attempt to land upon it to engage in the same pursuit. *People v. Batchelder*, 331.
11. INDIANS CANNOT MAKE VALID CONVEYANCE OF ALL OR ANY PORTION OF TRACT OF LAND granted to them by the governments of Mexico and the United States, whether such attempt is made by one or more, or even all the members of the tribe. The interest of the Indians in such grants is of a public nature, for the benefit of the Indian community at large. *Hicks v. Coleman*, 103.
12. STATE OF CALIFORNIA CANNOT SELECT AND LOCATE FIVE HUNDRED THOUSAND ACRES OF LAND granted her for purposes of internal improvement by the eighth section of the act of Congress of September 4, 1841, until after the lands to be selected have been surveyed and sectionized by the proper officers of the federal government. *Terry v. Megerle*, 84.
13. NO TITLE TO ANY SPECIFIC LAND CAN VEST IN STATE under the eighth section of the act of Congress of September 4, 1841, unless the land has been surveyed by the proper officers of the federal government, and selected and located by the state in parcels conformably to sectional divisions and subdivisions of not less than 320 acres, and has upon it no subsisting valid claim by pre-emption, or otherwise, and the selection has been approved by the federal government. *Id.*
14. STATE CAN MAKE NO VALID SELECTION OR LOCATION UPON PUBLIC LANDS OF UNITED STATES in the possession of a *bona fide* pre-emptioner under the laws of Congress, nor can it convey any valid title therein to another. *Id.*
15. BONA FIDE PRE-EMPTIONER OF PUBLIC LAND UNDER LAWS OF UNITED STATES MAY ATTACK COLLATERALLY a patent for the same land granted by the state by virtue of a selection of the land made by the state while the pre-emptioner was in possession, in an action of ejectment against him by the state patentee, for the state had no title to the land. *Id.*

PUBLIC POLICY.

PUBLIC POLICY DOES NOT FORBID COMBINATION OF WORKMEN, WHO ARE BOUND BY NO CONTRACT, for the purpose of obtaining reasonable prices for their labor. And common carriers may guard themselves against undue competition reducing freights below a fair compensation. *Sayre v. Louisville Bence Ass'n*, 613.

See CONTRACTS, 3; CORPORATIONS, 4.

QUESTIONS OF LAW AND FACT.

1. IN CASES ONLY INVOLVING QUESTIONS OF VALUE AND DAMAGE as questions of fact, the jury must, as a general rule, assess the amount of recovery. *Cooper v. Poston*, 610.
2. QUESTION INVOLVING DETERMINATION OF FACTS IN DISPUTE IS PROPERLY LEFT TO JURY, and no exception will lie to the refusal of a judge to rule upon it as a matter of law. *Pettingill v. Porter*, 671.

See NEGLIGENCE, 2, 3, 11, 12.

RAILROADS.

1. RAILROAD CORPORATION, AS WELL AS ITS DIRECTORS, IS CHARGEABLE WITH NOTICE of the time, place, and manner of the location of its road. *City of Aurora v. West*, 413.
 2. UNDER INDIANA STATUTE, RAILROAD COMPANY IS LIABLE, IRRESPECTIVE OF NEGLIGENCE, for injuries to animals, but not to persons, where the road might be but is not fenced; but where the proper fence is maintained, it is not answerable for animals injured, except as at common law, where there is negligence on its part, and the negligence of the owner of the stock does not contribute to its immediate injury. *Thayer v. St. Louis etc. R. R. Co.*, 409.
 3. RAILROAD COMPANIES ARE LIABLE, AS COMMON CARRIERS, FOR GOODS LOST OR INJURED, but they may by special contract limit this liability. *Id.*
 4. RAILROAD COMPANIES ARE LIABLE FOR INJURIES TO PERSONS NOT PASSENGERS, where the injuries arise from negligence on their part, to which injuries the negligence of the injured party does not immediately contribute. *Id.*
 5. RAILROAD COMPANIES MAY BE LIABLE FOR WANTON INJURIES TO PERSONS NOT PASSENGERS, even though there be negligence on the part of the injured party. *Id.*
 6. RAILROAD COMPANIES ARE LIABLE AS PUBLIC CARRIERS OF PASSENGERS FOR INJURIES RESULTING FROM NEGLIGENCE to use the utmost care of cautious persons, unless that liability is restricted by special contract. *Id.*
- See COMMON CARRIERS; CORPORATIONS, 2, 8, 9; MASTER AND SERVANT; NEGLIGENCE; RECEIVERS, 1, 2; STATUTES, 10, 11.

REALTY.

1. PLEADING IN ACTION TO RECOVER REAL ESTATE. — In an action to recover real estate under the California law, no particular form of complaint is necessary; it is only required that it should be adapted to the estate sought to be recovered, and the facts desired to be put in issue. But the judgment is conclusive upon the facts put in issue and determined. *Caperton v. Schmidt*, 187.
2. CONCLUSIVENESS AND ESTOPPEL OF JUDGMENT TO RECOVER POSSESSION OF REAL ESTATE IN CALIFORNIA IS LIMITED to the rights of the parties as they existed at the time when the verdict and judgment were rendered, and do not preclude either party from showing that their rights have been varied or extinguished at a subsequent period. *Id.*
3. INSTRUCTION THAT MAN CLAIMING TO OWN LAND IS BOUND TO KNOW STATE OF HIS OWN TITLE, is not in all cases correct, and is properly refused. *Davis v. Davis*, 157.

See FIXTURES; GROWING CROPS; VENDOR AND VENDEE.

RECEIVERS.

1. RAILROAD COMPANY, WHOSE ROAD WITH ALL ITS APPURTENANCES IS IN EXCLUSIVE POSSESSION, USE, AND CONTROL OF RECEIVER, who has power to employ, control, and dismiss all the agents, servants, and employees engaged on the road, is not liable for an injury resulting from the negligence of such agents or servants. *Ohio & Miss. R. R. Co. v. Davis*, 477.
2. POSSESSION OF RAILROAD BY RECEIVER APPOINTED BY COURT cannot be regarded as the possession of the railroad company. *Id.*

RECORDS.

1. AMENDMENT BY COURT, OF ITS RECORDS, IN ACCORDANCE WITH MINUTES entered on the judge's docket, by inserting an order sustaining a motion to set aside a sale of land in satisfaction of an execution, where no entry thereof has been made on the record, is not improper so far as it relates to the parties to the judgment upon which the execution issued, if upon notice to the party against whose interest the motion is made. Nor would the allowance of such an amendment be improper, even pending the trial of an action of ejectment for other premises, where the title of one of the parties depends upon a sale issued under the same judgment subsequently to the setting aside of the prior sale. But such amendment of the record cannot be allowed to have a retroactive effect as against persons not parties to the original record. *McCormick v. Wheeler, Mellick, & Co.*, 388.
2. ALL MATERIAL AMENDMENTS OF COURT RECORDS must be made with a saving of intervening rights acquired by third persons; and in orders allowing amendments it is proper to express this, by way of removing all doubt; but whether expressed or not, the law makes the reservation. *Id.*
3. JUDGE'S MINUTES ARE NOT RECORDS FROM WHICH TO ASCERTAIN JUDGMENT of court, where they consist of memoranda which the judge makes upon his own docket, and which the law does not require him to make, but which are merely kept by him for his own convenience, and to enable him to see that the clerk accurately makes up the record. But these minutes are a proper means of amending the record. Until, however, the amendment is made by entry on the record of what the minutes contain, the public can act upon no other means of information than the official records of the court, as kept by an officer appointed by the law for that purpose. *Id.*
4. IN ABSENCE OF ENTRY ON RECORD, CONTENTS OF JUDGE'S MINUTES ARE NOT NOTICE to a purchaser under a junior judgment, of land actually belonging to the judgment debtor, of the action of the court in setting aside a prior sale of other land in satisfaction of a senior judgment, on the ground that the land subjected to the latter sale did not belong to the judgment debtor. And even though such other was entered of record, its effect would simply be to create a prospective lien, and not one which would relate back and overcome an intervening judgment lien. *Id.*

REFEREES.

- REPORT OF REFEREE SHOULD BE SET ASIDE FOR UNCERTAINTY, if, where the statute of limitations is pleaded as a defense, it is impossible to ascertain from the report when the limitation commenced to run. *Doyle v. Reilly*, 582.

REPLEVIN.

1. REPLEVIN WAS COMMENCED AT COMMON LAW BY ORIGINAL WRIT issued out of the court of chancery, and issued only at Westminster; and to remove the inconvenience of procuring the writ when required in a distant part of the kingdom, the statute of Marlbridge was passed, which dispensed with the original writ, and substituted a proceeding, upon a complaint made to the sheriff, which was called a "proceeding by plaint." *Anderson v. Hapler*, 318.
2. "PLAINT," IN ILLINOIS STATUTE PROVIDING THAT REPLEVIN BE COMMENCED BY PLAINT, has the same meaning that it had under the statute of Marlbridge, and signifies a complaint that the goods or chattels were wrongfully taken or are wrongfully detained, which is made by means of the affidavit required by the statute. *Id.*
3. OWNER OF LAND MAY BRING REPLEVIN FOR CHATTELS SEVERED FROM FREEHOLD, where there was no adverse possession, but not if the land was held adversely, for he cannot assert his title in that manner. *Id.*
4. LANDLORD MAY BRING REPLEVIN FOR CHATTELS WRONGFULLY SEVERED FROM FREEHOLD by the tenant, as the title to the land is not thereby drawn in question, *semble*. *Id.*
5. VALUE OF GOODS REPLEVIED NEED NOT BE ALLEGED in writ or declaration under the English law. *Pomeroy v. Trimmer*, 714.
6. VALUE OF GOODS TO BE REPLEVIED NEED NOT BE ALLEGED IN WRIT OF REPLEVIN directed to a deputy sheriff. Such is the construction of the statutes of Massachusetts, and the law is understood to be the same in Maine. *Id.*
7. PLAINTIFF'S ALLEGATION OF VALUE IN WRIT OF REPLEVIN TO BE SERVED BY SHERIFF OR HIS DEPUTY has, when made, been held admissible against him in evidence of the value, but not to be conclusive evidence of the value of the property, even on the question of the jurisdiction of the court; and it is not in any way binding on the defendant. *Id.*
8. VALUE OF GOODS TO BE REPLEVIED OUGHT, PERHAPS, TO BE ALLEGED IN WRIT OF REPLEVIN where it is served by a constable, because his authority to serve it is limited to cases in which the sheriff or his deputy is a party and the property does not exceed a certain value; and because his authority in specific cases must appear on the face of the writ. *Id.*
9. WHERE DEFENDANT IN REPLEVIN PUTS IT OUT OF OFFICER'S POWER TO EXECUTE WRIT and deliver the property to the plaintiff, the plaintiff may proceed in the cause, and recover damages for the full value of the property as well as for the detention. *Id.*
10. DEFENDANT IN REPLEVIN WHO PREVENTS OFFICER FROM DELIVERING PROPERTY REPLEVIED TO PLAINTIFF BY ATTACHING IT upon a writ in his own favor, cannot object to the prosecution of the replevin on the ground of such non-delivery. *Id.*
11. DESCRIBING ANIMAL IN WRIT OF REPLEVIN AS "HEIFER" and in certificate appraisement as "cow," is no ground for dismissing the writ, particularly where the description in the appraisement directly refers to the writ, and clearly identifies the animals replevied. *Id.*
12. ACTION BETWEEN DIFFERENT PARTIES AND FOR DIFFERENT CAUSE IS NO BAR TO ACTION OF REPLEVIN. — Where the plaintiff, in a writ of replevin, has caused the officer, to whom the writ was committed, to bring an action against the defendant and another officer for taking the replevied property out of his hands by writ of attachment, before its delivery to the plaintiff, such suit is between different parties and for a

different cause, is no bar to the replevin suit, and is no ground for dismissing it. *Id.*

13. **SUIT FOR DIFFERENT CAUSE OF ACTION IS NO BAR TO REPLEVIN SUIT.** — Where the plaintiff in a replevin suit has begun an action as executor against the defendant and his officer for the conversion of the replevied property, and it fails to appear that the conversion relied upon is the same act for which the replevin is brought, it cannot affect the replevin suit. *Id.*
14. **BURDEN OF PROOF IS UPON PLAINTIFF IN REPLEVIN** where the answer sets up, in substance, the property in the defendant. *Turner v. Cool*, 449.
15. **WHERE WRIT COMMANDING OFFICER TO REPLEVY CERTAIN NUMBERS OF BARRELS** of mackerel is, with the assent of the defendant, executed by taking in part two half-barrels as equivalent to one barrel, the defendant cannot claim a return thereof on the ground that the officer seized property not described in his writ. *Gardner v. Lane*, 779.

See PROCESS, 2, 3.

RES ADJUDICATA.

1. **RES ADJUDICATA.** — Where there is a specific agreement to credit payments on a note, and the debtor has reason to believe, or no reason to doubt, that this has been done, and for that reason fails to defend, and an unjust amount is recovered against him, he cannot justly be held to have been negligent in not appearing and defending, and may be relieved, if the judgment has not been paid, to the extent of the payment which should have been credited; or, it seems, if the judgment has been compulsorily paid, he may maintain *assumpsit* for such sum. *Doyle v. Reilly*, 582.
2. **IT IS AS MUCH DUTY OF DEFENDANT TO PLEAD PAYMENT** as to set up any other defense which he may have, and if, in an action on a bond and mortgage, he fails to do so, and judgment is rendered against him for too large a sum, he cannot, unless excused by some equitable circumstance, such as fraud, accident, mistake, or surprise, make that recovery the ground of another action, but will be bound thereby. *Id.*
3. **PARTY FAILING TO DEFEND AT LAW, WHEN OPPORTUNITY IS GIVEN HIM,** will be concluded both at law and in equity, unless he can make a satisfactory showing why he did not interpose his defense. *Id.*
4. **IF PLAINTIFF IN FORECLOSURE PROCEEDING FAILS TO CREDIT PAYMENTS** made on the mortgage debt and takes a decree for the entire amount, but afterwards promises the defendant to refund the amount of such payments, the defendant may maintain an action on such promise, though he failed to plead such payments in the foreclosure proceeding. *Id.*

See EJECTMENT, 1; JUDGMENTS, 27; PLEADING AND PRACTICE, 5; REPLEVIN, 12, 13.

RESCISSION OF CONTRACTS.

See VENDOR AND VENDEE, 5.

REWARD.

See CONTRACTS, 1, 2.

RIPARIAN RIGHTS.

1. **APPROPRIATOR OF WATER OF STREAM IN MINERAL REGION FOR MINING PURPOSES.** who constructs in the stream a reservoir, has no right to run

out the water accumulated therein, carrying with it sand and sediment, upon the premises of a lower proprietor upon the same stream to the injury of his garden and fruit-trees, where he appropriated the premises for garden and orchard purposes prior to the construction of the reservoir. *Wixon v. Water and Mining Co.*, 69.

2. **APPROPRIATOR OF WATER OF STREAM IN MINERAL REGION FOR MINING PURPOSES** takes it subject to the rights of a prior appropriator of land for agricultural purposes, and is liable for injuries resulting to the premises from his use of the water. *Id.*
3. **GRANT OF USE OF WATER MAY BE PRESUMED WHEN**, in an action for the wrongful diversion of the water, the jury are satisfied from the evidence that the defendants have been in the continued, adverse, uninterrupted possession, use, and enjoyment of the water in dispute for five years preceding the commencement of the action. *Union Water Co. v. Orery*, 145.
4. **WATER MAY BE LAWFULLY DIVERTED**, if returned to its original channel without material diminution in quantity or quality, and at a point above the place where the original appropriator has use for it. In such a case, the first appropriator has no cause of action against the diverter. *Id.*
5. **WATER RIGHT ON PUBLIC MINERAL LANDS MAY BE ACQUIRED BY APPROPRIATION.** — The right to the use of a watercourse in the public mineral lands, and the right to divert and use the water taken therefrom, may be acquired by appropriation and user, and held, granted, abandoned, or lost, by the same means as a right of the same character issuing out of lands to which a private title exists. *Id.*
6. **WATER RIGHT ON PUBLIC MINERAL LANDS MAY BE ACQUIRED BY ADVERSE POSSESSION.** — The right of the first appropriator of water on public mineral lands may be lost by the adverse possession of another; and when such person has had the continued, uninterrupted, and adverse enjoyment of the water, or of some certain portion of it, during the period limited by the statute of limitations for entry upon lands, the law will presume a grant of the right so held and enjoyed by him. *Id.*

See EVIDENCE, 4, 5.

SALES.

1. **TRANSACTION IN SALE, AND WILL BE UPHOLD**, if *bona fide*, as against the vendor's creditors, although it was agreed that if, when the goods were sold by the vendee, more should be realized than the price paid by them, the excess, after deducting the expenses of sale, should be credited to the vendors. *Reeves v. Sebern*, 513.
2. **SELLER OF MACHINE IS UNDER NO OBLIGATION TO RECEIVE IT BACK, OR MAKE IT ALL RIGHT**, under an agreement so to do at time of sale, if it should prove not to be a good machine, unless called upon to perform within a reasonable time after the sale. *Osborn & Co. v. Stanley*, 347.
3. **WHERE CERTAIN NUMBER OF BARRELS OF NO. 1 MACKEREL ARE SOLD**, and by mistake some barrels of No. 3 mackerel and some barrels of salt are delivered, no title to the articles thus delivered by mistake passes to the purchaser. *Gardner v. Lane*, 779.
4. **WHERE, UNDER SALE OF NUMBER OF BARRELS OF MACKEREL, DELIVERY IS MADE** which includes some mackerel packed in half-barrels, the title will pass to the purchaser if the property is of the same kind and quality as that which the parties intended to include in their agreement. *Id.*
5. **BURDEN OF PROOF IS UPON PLAINTIFF IN ACTION FOR BREACH OF IMPLIED WARRANTY** of title on sale of chattel to show ownership in some other

person where the defendant was in possession at the time of the sale, unless the circumstances attending the possession rebut the presumption of ownership created thereby. *Bergen v. Biggs*, 304.

See CONVERSION; EXEMPTIONS, 5-10, 12-17, 20-22; INSOLVENCY, 2; JUDICIAL SALES; MORTGAGES, 9, 19, 20; PARTNERSHIP, 2-6; POSSESSION, 3; POWERS; STATUTE OF FRAUDS; WAREHOUSEMEN.

SELF-DEFENSE.

See CRIMINAL LAW, 2-10.

SERVITUDES.

UPPER OWNER OF TENEMENT HAS RIGHT to have his portion thereof supported by the division walls between him and the lower owner. And for the removal of such support by the lower owner, the upper owner may maintain an action, without showing special damage. *McConnell v. Kille*, 265.

SET-OFF.

1. CROSS-DEMAND MAY BE SET OFF in an action at law. *Downs v. Jackson*, 292.

2. EQUITY WILL NOT SET OFF mere cross-demands. *Id.*

See EXEMPTION, 2, 3.

SEWERS.

1. ACTION LIES AGAINST CITY FOR FAILURE TO KEEP ITS COMMON SEWER IN REPAIR, where it forces water back upon private estates and prevents water from being discharged therefrom, if damage is caused thereby, and the city has assumed to regulate the whole subject by ordinance requiring the particular drains from private estates to be entered into the main and common drains of the city, and to be laid out and constructed under the direction of the board of aldermen. *Berry v. City of Lowell*, 690.

2. NO ACTION LIES AGAINST CITY FOR FAILURE TO KEEP PUBLIC SEWER AND CREEPSPOOL IN REPAIR, whereby waste water accumulates and flows into the cellar of a neighboring house, where the owner of the private estate has not been required to conform his drainage to that which the city has provided for public purposes, and is not, in fact, connected by a drain with the public sewer. Such owner must protect himself or suffer the consequences. *Id.*

SHERIFFS.

1. PRESUMPTION EXISTS THAT SHERIFF DISCHARGED HIS OFFICIAL DUTY, by first serving attachments that issued on the petition first served. *Buchner v. Bush*, 634.

2. DUTY OF SHERIFF ELECTED TO TWO SUCCESSIVE TERMS TO EXECUTE WRIT OF VENDITIONI EXPOSAS, issued during his first term, devolves on him by his first term, and where the bond sued on relates only to his second term, it does not bind him or his sureties for the performance of that duty. *Colyer v. Higgins*, 601.

3. WRIT OF VENDITIONI EXPOSAS GIVES NO NEW AUTHORITY TO SHERIFF, but merely commands him to perform his duty under the original writ. *Id.*

4. ONE WHO BEGINS EXECUTION OF WRIT OF FIERI FACIAS MUST END IT. — A sheriff who levies upon property may sell it after the return day, and

after returning the execution, without a writ of *venditioni exponas*, and after he has gone out of office, and it is his duty to do so. *Id.*

See ATTACHMENTS; EXECUTIONS.

SHIPPING.

1. DEMURRAGE STRICTLY SPEAKING IS SUM OF MONEY due by express contract for the detention of a vessel in loading or unloading one or more days beyond the time allowed for that purpose in the charter-party. *Wordin v. Bemis*, 255.
2. DEMURRAGE BEING CERTAIN SUM DUE by force of an express contract, general *assumpsit* will lie for it. *Id.*
3. DAMAGES IN NATURE OF DEMURRAGE are recoverable for the detention of a vessel beyond a reasonable time in unloading only, where there is no express stipulation to pay demurrage. Such damages are recoverable for a breach of the implied contract of the shipper that he will receive the goods in a reasonable time and can be recovered only in special *assumpsit*. *Id.*
4. WHERE MASTER RUNS VESSEL ON SHARES, pays all expenses, has entire control of her course of employment, and makes all contracts in respect to her employment in his own name and of his own behalf, he is *pro hac vice* owner, and may maintain an action to recover damages in the nature of demurrage. *Id.*
5. WHERE CARGO IS TRANSPORTED BY WATER and there is no specific agreement between the shipper and carrier in respect to the particular wharf or spot at the port, where the cargo shall be landed, or any known custom of the port, the shipper or his agent must be there ready to receive the cargo, on notice of the arrival of the vessel, and upon his failure to do so, the carrier may treat the contract as broken, land the cargo at the usual place, if there is any such, or procure a suitable place at the expense of the shipper, or await his or his agent's tardy movements, and rely upon obtaining compensation in an action for the breach of the implied contract to receive the cargo in a reasonable time. *Id.*
6. SHIPPER IS LIABLE FOR INJURY SUSTAINED BY CARRIER through the unreasonable delay of an intermediate carrier in receiving and transporting a cargo, where the bill of lading only requires the original carrier to deliver such cargo to the shipper or his assigns without mention of delivery to such intermediate carrier as such. *Id.*
7. VESSELS WHOSE CARGOES ARE TO BE DISCHARGED at the same dock must take their turn in the order of their arrival, and the owner of such dock is not bound to make provision for an unexpected and accidental accumulation of vessels. *Id.*
8. DAMAGES IN NATURE OF DEMURRAGE CANNOT BE RECOVERED for an unreasonable delay to a vessel in discharging her cargo, when such detention is caused by an accidental and unexpected accumulation of vessels at the same dock where all must discharge and where each in turn does discharge her cargo. *Id.*
9. BILL OF LADING IS SIMPLE WRITTEN CONTRACT BETWEEN SHIPPER OF GOODS AND SHIP-OWNER; the latter to carry the goods, and the former to pay the stipulated compensation when the service is performed. *Wooster v. Tarr*, 707.
10. MASTER IS NOT BOUND AT HIS PERIL TO ENFORCE PAYMENT OF FREIGHT FROM CONSIGNEES. He may waive his right of lien, deliver the goods

without receiving payment of the freight, and yet his right to resort to the shipper for compensation still remains. *Id.*

11. SHIPPER NAMED IN BILL OF LADING IS LIABLE TO CARRIER FOR FREIGHT, although he does not own the goods, and the carrier has waived his lien upon them; as he is the party with whom the owner or master enters into the contract of affreightment. *Id.*

See EVIDENCE, 7; INSURANCE, 10-14.

SLANDER.

1. BOTH JUDGES AND JURORS SHALL UNDERSTAND WORDS IN THAT SENSE WHICH AUTHOR INTENDED TO CONVEY to the minds of the hearers, as evinced by all the circumstances of the case. The jury are to decide, as a matter of fact, to be collected from all the concomitant circumstances, whether the words were used maliciously and with a view to defame; and it is for the court to determine whether such words, taken in the malicious sense imputed to them, can alone, or by the aid of the circumstances stated upon the record, form the legal basis of an action. *Harrison v. Findley*, 456.
2. DOCTRINE THAT WORDS MUST BE CONSTRUED IN MITTORI SENSU has been exploded. *Id.*
3. IF ANY SET OF WORDS CHARGED IN ANY ONE OF PARAGRAPHS OF COMPLAINT IS ACTIONABLE, a demurrer to that paragraph should be overruled. *Id.*
4. CERTAIN WORDS HELD TO BE ACTIONABLE PER SE, and others to be made so by the facts alleged. *Id.*

SOVEREIGNTY.

TAX LAW OF KENTUCKY APPLIES TO PERSONS ONLY, and not to political bodies exercising in different degrees the sovereignty of the state. *City of Louisville v. Commonwealth*, 624.

STATUTES.

1. IN ILLINOIS, BILL SIGNED BY PRESIDENT OF SENATE AND SPEAKER OF HOUSE, AND APPROVED BY GOVERNOR, would be conclusive of its validity and binding force as a law, except for the constitutional provision requiring that all bills, before they can become laws, shall be read three several times in each house, and shall be passed by a vote of a majority of all the members elect. *People ex rel. Barnes v. Starnes*, 348.
2. WHEN BILL IS SIGNED BY BOTH SPEAKERS AND APPROVED BY GOVERNOR, the presumption is raised that it has been constitutionally adopted, but this presumption may be rebutted by the journals of the two houses. *Id.*
3. ACCORDING TO ADOPTED THEORY OF LEGISLATION IN ILLINOIS, when a bill has become a law, there must be record evidence of every material requirement, from its introduction until it becomes a law, and this evidence is found upon the journals of the two houses. *Id.*
4. BILL PURPORTING TO BE APPROPRIATION ACT IS NOT LAW, though signed by the speakers of the two houses, and approved by the governor, where it does not appear from the journal of the house of representatives to have passed that body. *Id.*
5. STATUTE PENAL IN ITS CHARACTER must be strictly construed. *Harrison v. State*, 658.

6. STATUTE SHOULD NOT BE DECLARED UNCONSTITUTIONAL or invalid in a doubtful case where the doubt is "*bona fide*" and well founded. Declaring a statute unconstitutional is the exercise of a judicial power of grave and delicate nature, which can only be warranted in a clear case. *Id.*
7. PENAL STATUTES ARE TO BE STRICTLY CONSTRUED. — Thus, a statute requiring the employment of an auctioneer to make sales at auction, and prohibiting other persons from doing so, applies only to the act of sale, and does not prohibit other persons from appointing the time and place of sale, advertising, giving notice to interested parties, and making adjournments. These acts are preliminary, and constitute no part of the contract or act of sale. *Hosmer v. Sargent*, 638.
8. STATUTES IN "*PARI MATERIA*" ARE TO BE CONSTRUED together, as parts of one system. *Harrison v. State*, 658.
9. CONTEMPORANEOUS LEGISLATION IS BEST STANDARD of the meaning of laws. *Id.*
10. RAILROAD RUNNING THROUGH CITY RUNS TO SUCH CITY, WITHIN MEANING OF STATUTE authorizing a subscription by the city in aid of the railroad in case it runs to it. *City of Aurora v. West*, 413.
11. IF CITY IS AUTHORIZED TO SUBSCRIBE STOCK IN AID OF RAILROAD WHICH SHALL RUN TO IT, and such city is not made one of the points of the road in the charter, no absolute subscription of stock in such corporation can be made by such city until action had been had to bring the railroad to such city. *Id.*

See HIGHWAYS, 9; MARRIAGE AND DIVORCE.

STATUTE OF FRAUDS.

1. STATUTE OF FRAUDS — CHANGE OF POSSESSION. — When a case arises under the provisions of the statute of frauds, requiring an immediate delivery and an actual and continued change of possession upon a sale of goods, a question of fact is raised as to whether these requirements have been complied with, which must be determined like any other question of fact, by an inspection of all the circumstances of the case. *Godchaux v. Mulford*, 178.
2. EMPLOYMENT OF VENDOR BY VENDEE — STATUTE OF FRAUDS. — Employment of vendor by the vendee in the subordinate capacity of clerk or salesman to take charge of the goods which were the subject of the sale, is not incompatible with an actual and continued change of possession within the meaning of the statute, and is not of itself conclusive evidence of fraud. It is not *per se* a fraud which admits of no explanation, but is a strong circumstance tending to show that there has not been such change of possession as the statute requires. *Id.*
3. WHERE VENDEE OF GOODS EMPLOYS VENDOR THEREOF TO TAKE CHARGE OF THEM, the latter cannot be allowed to remain in the apparently sole and exclusive possession of the goods after sales, for that would be inconsistent with such an open and notorious delivery and change of possession as the statute contemplates. But if it is apparent to all the world that he has ceased to be the owner, and that another has acquired and openly occupied that position, the statute is satisfied. *Id.*
4. WHERE VENDOR OF GOODS HAS BEEN EMPLOYED BY VENDEE THEREOF to take charge of them, it is competent for a creditor of the vendors to prove this fact as tending to show that there has been no actual and continued change of possession; but when proved, it does not become con-

clusive of that question, but is only an element of proof to be weighed by the jury. *Id.*

5. **CHATTEL MORTGAGES NOT WITHIN STATUTE OF FRAUDS.**—Provision of statute of frauds prohibiting conveyances made in trust for the use of the person making the same, does not include chattel mortgages, but was intended to prevent a debtor from placing his property in the hands of a trustee having no beneficial interest therein, to hold for his benefit solely, and to enable him to receive and enjoy its income at pleasure, to the prejudice of his creditors. *Id.*
6. **CHATTEL MORTGAGE NOT WITHIN STATUTE OF FRAUDS.**—Where an instrument is upon its face a chattel mortgage containing the usual defeasances, or where it contains no defeasance, but is in fact intended as a mortgage, there is, in the first place, an open, and in the second a secret, trust as to any surplus or excess; yet neither is within the statute of frauds. A trust as to surplus necessarily arises in the case of a mortgage growing out of the nature of the contract, but the trust is not the object of the assignment. Its object is to give the mortgagee a lien as security for the payment of his debt, and other creditors are not in a legal sense hindered, delayed, or defrauded by the transaction. *Id.*

STATUTE OF LIMITATIONS.

1. **STATUTE OF LIMITATIONS BARS RECOVERY** of all damages, whether nominal or substantial, sustained prior to the time within which the law requires an action for their recovery to be brought. *McConnel v. Kibbe*, 265.
2. **POSSESSION OF PERSONAL PROPERTY CREATES NO BAR BY LIMITATION AGAINST GOVERNMENT**, though long and uninterrupted possession might raise the presumption that the government had parted with its title. *Bergen v. Riggs*, 304.
3. **COMPLAINT UPON PROMISSORY NOTE, COLLECTION OF WHICH IS BARRED BY STATUTE OF LIMITATIONS, CONTAINS CAUSE OF ACTION**, where it alleges that the defendant has, within four years prior to the commencement of suit, "in writing, acknowledged and promised to pay the note." *Porter v. Elam*, 132.
4. **WHILE THERE CAN BE NO WRITTEN PROMISE OR ACKNOWLEDGMENT WITHOUT SIGNATURE**, an allegation that defendant, "in writing," acknowledged and promised to pay his note, imports that the defendant signed his name to the writing. *Id.*
5. **MERE RECEIPT FOR MONEY IS NOT CONTRACT, AND DOES NOT IMPORT PROMISE, obligation, or liability**; and an action thereon is therefore barred in two years by the statute of limitations. *Ashley v. Fischer*, 65.
6. **RECEIPT FOR MONEY STATING THAT MONEY IS TO BE APPLIED TO ACCOUNT OF PERSON** from whom it is received, partakes of the double character of a receipt and contract, and shows upon its face a liability to account, and an action thereon is not barred by the statute of limitations until the expiration of four years. *Id.*
7. **ACQUISITION OF TITLE IN FEE TO LAND UNDER STATUTE OF LIMITATIONS.**—One having open possession of part of a tract of land, and claiming the whole, where there is no adverse possession, will, by holding it for the period prescribed by the statute of limitations, acquire a title in fee thereto. *Hicks v. Coleman*, 103.
8. **STATUTE OF LIMITATIONS.**—An action to recover lands within the pueblo of San Francisco, by one holding title derived from the pueblo, may be

brought at any time within five years after the issuance of a patent for the public lands by the United States. *Davis v. Davis*, 157.

See ADVERSE POSSESSION; DAMAGES, 7-9; MORTGAGES, 1-5; REFERENCE.

STREETS.

See HIGHWAYS.

SURETYSHIP.

1. SURETIES UPON OFFICIAL BONDS, AS GENERAL RULE, ARE NOT CONCLUDED by decree or judgment against their principal, unless they have had their day in court or an opportunity to be heard in their defense; but administration bonds form an exception to this general rule. *Irvine v. Bachus*, 125.
2. PARTY CONTRACTING JOINTLY WITH ANOTHER IS PRINCIPAL DEBTOR as between himself and the creditor, though he may be merely a surety for his co-debtor. *Dane v. Corduan*, 53.
3. SURETY IS NOT DISCHARGED FROM HIS LIABILITY BY FAILURE OF CREDITOR TO SUE the principal debtor when requested so to do by the surety. *Id.*
4. DECREE OF EQUITY OBTAINED AT SUIT OF SURETY, AND REQUIRING CREDITOR to sue principal debtor, is not a bar to an action against the surety, though the creditor fails to sue the principal debtor, unless the surety specifically performs the conditions imposed by the decree; and where the decree prescribes the condition that the surety tender to the creditor a sufficient amount to pay reasonable costs and expenses in the suit against the principal, a payment to the clerk and sheriff of a sufficient amount to pay their fees in the contemplated suit is not a compliance with the condition. *Id.*

See ATTORNEY AND CLIENT, 3; EXECUTORS AND ADMINISTRATORS, 3-6.

TAXATION.

1. EXPRESS EXEMPTIONS SPECIFIED IN TAX LAW OF KENTUCKY DO NOT IMPLY that no property not excepted shall be exempt, or that municipal property, used for public purposes of local government, was intended to be subject to taxation. Property owned and used by city of Louisville, in its social or commercial capacity, as a private corporation, and for its own profit, such as vacant lots, market-houses, fire-engines, etc., is subject to taxation, but property dedicated to charity is not. *City of Louisville v. Commonwealth*, 624.
2. PROVISIONS OF KENTUCKY STATUTE LAW DEFINING PROPERTY SUBJECT TO and exempt from taxation, where embodied. *Id.*
3. ERROR OF SHERIFF IN NEGLECTING TO AFFIX SEAL TO DEED OF LAND SOLD FOR TAXES will not be corrected by a court of chancery, tax titles being purely technical as distinguished from meritorious titles, and depending for validity upon strict compliance with the statute. *Alles v. Hinckler*, 406.
4. ADDING TO OR STRENGTHENING TITLE UNDER SALE FOR TAXES. — One who is under any legal or moral obligation to pay taxes cannot, by neglecting to pay the same and allowing the land to be sold in consequence of such neglect, add to or strengthen his title by purchasing at the sale himself, or by subsequently buying from a stranger who purchased at the sale. *Moss v. Shear*, 94.

5. ONE WHO IS UNDER NO LEGAL OR MORAL OBLIGATION TO PAY TAXES IS NOT PRECLUDED FROM PURCHASING at the tax sale, although in possession at the time the assessment was made, or when the land was sold. *Id.*
 6. ACTS OF ASSESSOR IN MAKING ASSESSMENTS FOR TAXES ARE INVALID, unless the provisions of the statute are strictly followed, and all its conditions fully complied with by him. *Id.*
 7. INVALID ASSESSMENT CONSTITUTES NO CHARGE UPON LAND, and no legal obligation is thereby imposed upon any one to pay the taxes. *Id.*
 8. ASSESSMENT IN NAME OF OWNER. — Under the California revenue act of 1854, the assessor is required to list the land in the name of the owner, when known, whether the land be vacant or occupied. If the land be listed to the owner, nothing more need be stated by the assessor. *Id.*
 9. ASSESSMENT IN NAME OF UNKNOWN OWNER, WHERE LAND IS UNOCCUPIED. Under the California revenue act of 1854, the assessor must, when the owner is unknown, and the land is unoccupied, list it as the land of a person unknown. If the land is unoccupied, and the owner unknown, both of these facts must appear in the assessor's list in order to make an assessment to an unknown owner valid. And if the land be listed as the land of a person unknown, the assessor must state that the land is so listed because the owner is unknown, and the land is unoccupied. *Id.*
 10. ASSESSMENT IN NAME OF OCCUPANT WHERE OWNER IS UNKNOWN. — Under the California revenue act of 1854, the assessor must, when the owner is unknown, list the land, if occupied, in the name of the occupant. If the land is occupied and the owner unknown, both of these facts must appear in the list in order to make an assessment to the occupant valid. Where the land is occupied, ignorance of the true owner is a condition precedent to the validity of an assessment against an occupant; and if the land be listed in the name of an occupant who is not the owner, it must be stated by the assessor to have been so listed because the owner was unknown to him. *Id.*
 11. CHANGE OF COUNTY BOUNDARIES AFTER LAND HAS BEEN ASSESSED FOR TAXES does not affect the lien of the tax on the land; and the collector of the old county has power to sell the land to enforce the lien, where the land falls into another county by reason of such change. *Id.*
 12. TAX DEED NEED NOT CONTAIN RECITALS OF VARIOUS ACTS, required under the revenue act of 1854, showing a compliance on the part of the revenue officers with the several conditions of the statute. These acts are only required to be recited in the certificate of purchase. Their omission from the deed only affects the question of proof. If inserted in the deed, they are *prima facie* evidence; but if not inserted, they may be proved *abunde*. *Id.*
 13. TAX DEED NEED BE IN NO PARTICULAR FORM. — The statute requires only a deed of conveyance in fee-simple to the purchaser; and any deed is sufficient if, according to the rules of the common law, it will transfer the title of the former owner, and vest the estate in the purchaser, provided it recites the power under which it was made, and is accompanied by proof that the law was strictly complied with. *Id.*
- See ADVERSE POSSESSION, 2; CORPORATIONS, 10-15; SOVEREIGNTY.

TELEGRAPHS.

1. TELEGRAPH COMPANY RECEIVING MESSAGE IN ITS OFFICE IS BOUND TO TRANSMIT IT with impartiality and good faith in the order of time in

which it is received; and a failure to do so makes the company liable to the person whose dispatch is neglected or postponed. But private dispatches must give way to the transmission of intelligence of general and public interest, and to communications for and from officers of justice. *Western Union Tel. Co. v. Ward*, 462.

2. PARTY IS ENTITLED TO RECOVER OF TELEGRAPH COMPANY PENALTY of one hundred dollars, under the Indiana statute, where he took a message to the company's office, and, after being informed by the agent that it could be transmitted immediately, paid the charges demanded, but the message was not sent until the following morning, when it was too late to be of any service, unless the company shows that, after receiving the message, the same could not be sent by reason of some derangement of the wires, or that it was postponed in consequence of the transmission of intelligence of general and public interest, or of communications for or from officers of justice. *Id.*

TENDER.

See NEGOTIABLE INSTRUMENTS, 36; VENDOR AND VENDEE, 8.

TROVER.

See GROWING CROPS, 2.

TRUSTS.

1. COURT OF EQUITY, AS PART OF ITS ORIGINAL AND INHERENT JURISDICTION, will compel the proper application of a trust fund, and require the trustee to render an account of his proceedings under the trust. *Dole v. Olmstead*, 397.
2. BILL TO COMPEL CONVEYANCE OF LEGAL TITLE FROM TRUSTEE may be sustained, though no demand for the title is made before suit brought, but the complainant will be subjected to costs. *Forbes v. Hall*, 301.
3. WHERE TRUSTEE IN TRUST DEED is authorized to sell for cash upon default of payment of the money for which the deed was given, he cannot sell on credit, and if he does sell on time the sale may be set aside as void. *Cassell v. Ross*, 270.
4. TRUSTEE UNDER DEED OF TRUST has no power to impose new terms or conditions, or to alter or vary those contained in the deed. *Id.*
5. IMMEDIATE GRANTEE OR PURCHASER AT TRUSTEE'S SALE under trust deed is bound at his peril to examine the title he is purchasing, and must see that all precedent conditions of the sale are complied with by the trustee. Without this he cannot protect himself by insisting that he is a purchaser in good faith without notice, and the sale may be set aside. The rule is believed to be different, however, with a remote purchaser. *Id.*
6. PURCHASE OF PROPERTY BY TRUSTEE OF CESTUI QUE TRUST IS NOT VOID BUT VOIDABLE; although such a sale will not only be set aside for fraud, but upon a very slight showing of advantage or bad faith; but when it is clear that the *cestui que trust* intended that the trustee should buy, and there is no fraud, concealment, or advantage taken by the trustee of information acquired by him as such, the purchase will be upheld and enforced. *Buell v. Buckingham*, 516.

UNLAWFUL DETAINER.

See FORCEIBLE ENTRY AND DETAINER.

USAGE.

USAGE IN PARTICULAR PLACE, HOWEVER LONG OR WELL ESTABLISHED, that checks may be received as a means of payment for a bill, and the bill be held over until the next day without protest, for the purpose of ascertaining whether the check will be paid, cannot be allowed to alter the general commercial usage of the world. *Strong v. King*, 336.

USURY.

1. **CONTRACT FOR CONSIDERATION EXCEEDING LEGAL INTEREST** to forbear enforcing payment of note, which is not in itself tainted with usury, will not operate to taint the note with usury, but will render the contract void therefor, and the money paid thereon will be applied as a credit on the note. *Mallett v. Stone*, 545.
2. **USURY DOES NOT SUBJECT TO PENALTIES OR FORFEITURES** in Indiana, since 1863. *Musaelman v. McElhenney*, 445.
3. **IF USURIOUS INTEREST IS TAKEN OUT IN ADVANCE**, it makes a case of want of consideration, in a note covering the amount, to the extent of such interest. *Id.*
4. **WHERE USURIOUS INTEREST IS PAID ON NOTE AFTER ITS EXPIRATION**, it amounts to a payment of so much on the principal; and if the amount thus paid exceeds the principal, it may be recovered back. *Id.*
5. **PROMISE MADE IN NOTE TO PAY USURIOUS INTEREST IN FUTURE** is promise, to that extent, without consideration. *Id.*

VENDOR AND VENDEE.

1. **PURCHASER OF LAND BY AGREEMENT ACQUIRES EQUITABLE TITLE WHEN HE HAS COMPLETED HIS PART OF CONTRACT**, by paying the purchase-money, and receiving written evidence of the agreement of the vendor to convey the premises. And such title may always be asserted in a court of equity against the holder of the legal title, whether in the vendor or his vendee, with notice. *Brill v. Stiles*, 364.
2. **AT LAW MERELY EQUITABLE TITLE IS NOT REGARDED**, and is unavailing for a recovery or defense against the legal title. *Id.*
3. **MISTAKES OF PARTIES IN SALES OF LAND AS TO LOCATION AND DESCRIPTION** of the premises intended to be sold may be corrected on sufficient proof. *Stille v. McDowell*, 590.
4. **PROOF OF MISTAKE OF PARTIES IN SALES OF LAND AS TO LOCATION AND DESCRIPTION**, to authorize correction thereof, must be clear and decisive, but it is error to instruct jury that in order to find the fact of such mistake they must be satisfied beyond a reasonable doubt. *Id.*
5. **AVERTMENT OF OFFER TO RESCIND CONTRACT FOR SALE OF LAND WOULD BE ESTABLISHED** by proof that the opposite party had prevented or dispensed with a formal tender of a deed. *Id.*
6. **WHERE ONE PARTY TO ORAL AGREEMENT FOR EXCHANGE OF LANDS HAS EXECUTED AND DELIVERED HIS DEED**, and the other has refused to fulfill his agreement or delivered an invalid deed, an action for money had and received cannot be maintained against the latter, although the land conveyed to him was estimated at a fixed sum, and has been since sold by him and converted into money. The action should be for the price of land sold and conveyed. *Bayford v. Pearson*, 764.
7. **GRANTEE NOT BOUND TO PAY OFF MORTGAGE**. — Grantee's purchase of land conveyed to him by deed of warranty, subject to a mortgage, does

- not import a promise on his part to pay such mortgage, nor does he thereby undertake or become bound to pay it off. *Strong v. Converse*, 732.
6. **VENDOR'S IMPLIED LIEN FOR PURCHASE-MONEY IS MERGED OR WAIVED**, in general, by taking a mortgage as security. *Burnap v. Cook*, 507.
 9. **IT IS NOT ESSENTIAL TO PERFORMANCE OF COVENANT, BY VENDOR, TO CONVEY** by "a good and sufficient deed of general warranty" that his wife should join in the deed and release her right of dower. If he tenders a deed executed by himself alone, containing the covenant stipulated for, that is a performance of his agreement. *Bostwick v. Williams*, 385.
 10. **COVENANT TO CONVEY BY DEED OF GENERAL WARRANTY** amounts to no more than an engagement that it shall bar the covenantor and his heirs forever from claiming the land, and that he and his heirs shall undertake to defend it when assailed by a paramount title. *Id.*
 11. **COVENANT OF GENERAL WARRANTY DOES NOT INCLUDE COVENANT AGAINST ENCUMBRANCES.** *Id.*
 12. **POSSIBILITY OF DOWER IS NOT ENCUMBRANCE**, within sense of covenant against encumbrances, for such a covenant implies a settled, fixed encumbrance. *Id.*
 13. **COVENANT OF GENERAL WARRANTY IS USUALLY TREATED AS SYNONYMOUS** with covenant for quiet enjoyment, since the same concurrence of circumstances is necessary to their breach, and they equally possess the capacity of running with the land, and the rule as to the measure of damages is the same in both. *Id.*
 14. **COVENANT OF GENERAL WARRANTY IS NOT BROKEN UNTIL EVICTION** or something equivalent thereto. *Id.*
 15. **GRANTEE IN DEED WITH COVENANT OF GENERAL WARRANTY** may recover on the covenant for such injury as he suffers by reason of the recovery by the wife of the grantor of dower in the property conveyed, the right of dower not having been released by the deed. *Id.*
 16. **WHERE GRANTEE SOLICITS GRANTOR TO PURCHASE OUTSTANDING TITLE**, and executes his note in payment therefor when made, such purchase, whether perfect or imperfect, is a sufficient consideration for the note if not induced by fraud, and it makes no difference that the grantee was ignorant of the fact that a subsequently acquired title by his grantor, under the covenants in the deed, would inure to the benefit of the grantee. *Cassell v. Rosa*, 270.
 17. **COMPROMISE OF DOUBTFUL RIGHT** is sufficient consideration for a promise; and it is immaterial on whose side the right ultimately proves to be. This rule is here applied to a grantee who requested his grantor to purchase an outstanding title, and executed his note in payment therefor. *Id.*
 18. **WHERE GRANTEE REQUESTS GRANTOR** to purchase an outstanding title, and executes his note in payment therefor, the grantor agreeing when the purchase is made and the note paid, to execute a quitclaim deed, he is not in default in failing to make and deliver such deed, and there is no failure of consideration until the note is paid in full. Before such time the grantee has no right to demand the deed. *Id.*

See **FIXTURES**, 2, 3; **GROWING CROPS**; **HOMESTEADS**, 9, 10.

VERDICT.

See **DAMAGES**, 4; **JUDGMENTS**, 12-14; **JURY AND JURORS**; **NEGLIGENCE**, 2, 11.

WAIVER.

WAIVER IS INTENTIONAL RELINQUISHMENT OF KNOWN RIGHT.—There must be knowledge of the existence of the right, and an intention to relinquish it. *Horne v. Home Ins. Co.*, 240.

WAREHOUSEMEN.

1. **ASSIGNEE OF MASS OF GRAIN IN WAREHOUSE** belonging to a number of persons, who by reason of its intermingling have become owners in common, is trustee for all the parties in interest; and where there is a deficiency in the quantity of the grain, and in consequence the several owners are unable to show the respective quantities due them from the mass, a court of equity will have jurisdiction to bring such trustee and all the parties before it, and to do complete justice between them. *Dole v. Olmstead*, 397.
2. **WAREHOUSEMAN'S RECEIPT FOR GRAIN DOES NOT CLOTHER HOLDER** with any specific or general lien on the property of the warehouseman, although that should consist also of grain put in common bulk with that of the holder of the receipt; but such property of the warehouseman remains subject to sale and transfer, precisely as though such a receipt had not been given; and the holder of the receipt has only the obligation of the warehouseman for proper storage and delivery of his grain, according to the terms thereof, or on default has a right to recover the damages growing out of a breach of the contract. *Id.*
3. **WHERE WAREHOUSEMAN HAVING IN STORE GRAIN OF VARIOUS PERSONS**, for which he has given receipts, together with grain of his own (the whole being kept in one common bulk by the consent of all parties), transfers, by verbal assignment, all the grain thus in store to a creditor to secure his debt, to be held subject to the rights of the different owners, the assignee will hold the property as a trustee for the benefit of all parties in interest, and will be bound to deliver to the receipt-holders all the grain which belonged to them and which was in store at the time of assignment, but beyond that will incur no liability; and whatever grain was in store belonging to the warehouseman, the assignee will have the right to retain and apply to his own debt. *Id.*
4. **ON ASSIGNMENT BY WAREHOUSEMAN OF BULK OF GRAIN IN WAREHOUSE** to secure his own debt, such grain consisting partly of his own and partly of that stored with him, and for which he has given receipts, and there is included in the assignment contracts for the purchase of grain made by the warehouseman, upon which he had advanced some money and received a portion of the grain, the assignee becomes the equitable owner of such contracts, to the exclusion entirely of the holders of the grain receipts from the warehouseman; and the assignee has the right to complete such contracts, and appropriate the grain he may receive upon them to his own debt, after deducting the money he advanced to complete them. *Id.*
5. **WHERE GRAIN OF DIFFERENT OWNERS BECOMES INTERMINGLED IN ONE COMMON MASS**, according to the usage of warehousemen, and without objection by the owners, it becomes common property, owned by the several parties in the proportion in which each contributed to the common stock, and the several owners are subject to sustain any loss *pro rata* which may occur by diminution, decay, or otherwise. *Id.*
6. **ON ASSIGNMENT BY WAREHOUSEMAN OF MASS OF GRAIN**, for the purpose of securing his debt, where such grain was partly his own and partly

stored by persons who took his receipts therefor, the assignee purchasing any of such receipts would be subject to sustain his *pro rata* share of the loss occasioned by any deficiency precisely as would the original holders. *Id.*

7. **HOLDER OF RECEIPT FOR GRAIN IN WAREHOUSE** who has become owner in common with others by the intermingling of the grain of all in one common mass, if he has received the full quantity called for by his receipt or a larger proportion than his ratable share, would, in view of a deficiency, be bound to account for such excess received by him in proportion to the loss. *Id.*

WATERCOURSES.

See **BOUNDARIES**, 5; **EVIDENCE**, 4, 5; **RIPARIAN RIGHTS**.

WAYS.

1. **WAY OVER OTHER LAND OF GRANTOR IN DEED MAY PASS AS AFFRONTMENT TO LAND GRANTED**, even though there be no "insuperable physical obstacles" to prevent access by another way, if such other way cannot be made without unreasonable labor and expense. And a jury in determining this question may consider the comparative value of the land and the probable cost of such a way. *Pettingill v. Porter*, 671.
2. **TERMS "NECESSARY" AND "UNREASONABLE LABOR AND EXPENSE" DEFINED.** In determining necessity for ways to pass with land, the word "necessary" does not mean absolute physical necessity; and "unreasonable labor and expense" means excessive and disproportionate to the value of the property purchased. *Id.*

See **HIGHWAYS**.

WHARVES.

LEGISLATURE MAY AUTHORIZE ERECTION OF WHARVES, and reclamation of land from water, for the purpose of encouraging navigation and commerce, although the effect is to confer privileges and advantages wholly private and exclusive in their character. *Phipps v. State*, 654.

WILLS.

1. **WILL DULY ATTESTED, GIVING SUM OF MONEY TO TRUSTEE TO APPROPRIATE SAME** in such manner as the testator may by any instrument in writing under his hand direct and appoint, and an appointment by a separate instrument in writing signed by the testator, but not attested as required by the statute of wills, declaring the appropriation and naming the beneficiary, do not operate to create a valid bequest in favor of the beneficiary, and cannot be enforced as such. And where no charity is declared or indicated in the will, the fact that the legacy is appropriated by the unattested instrument to a public charity does not give to it any greater legal effect. *Thayer v. Wellington*, 753.
2. **DEVISES OF REAL ESTATE AND LEGACIES OF PERSONAL ESTATE HAVE BEEN PLACED UPON SUBSTANTIALLY SAME FOOTING** in Massachusetts, as to the extent of the power to devise and the formalities required in the execution of a testamentary instrument. And both a lapsed devise of real estate and a lapsed legacy of personal estate will pass under a general residuary clause in the will, unless a clear intention to the contrary is shown by the will. *Id.*

WITNESSES.

1. **PARTY CANNOT ATTACK CREDIBILITY OF HIS OWN WITNESS** by evidence of general reputation. *Obnstead v. Winsted Bank*, 260.
2. **WHERE PARTY'S OWN WITNESS TESTIFIES** in respect to a particular fact contrary to what the former believes to be true, he may prove the fact to be otherwise by other competent testimony, no matter how much the particular contradiction may tend to discredit the witness generally. *Id.*
3. **FORM OF QUESTIONS TO EXPERTS** is not regulated by any exclusive formula. Any question is proper which will elicit their opinions as to matters of science or skill which are in controversy, and at the same time exclude their opinion as to the effect of the evidence in establishing controverted facts. But if it requires the witness to draw a conclusion of fact, it should be excluded. *Hunt v. Lowell Gas Light Co.*, 697.
4. **WHO ARE REPRESENTATIVES — WITNESSES.** — In statute which provides that no person shall be allowed to testify in an action where the adverse party, or the party for whose immediate benefit the action is prosecuted or defended, is the representative of a deceased person, where the facts to be proved transpired before the death of such deceased person, the word "representative," not only includes the executor or administrator of a deceased person, but also any one who has succeeded to the right of such deceased, whether by purchase or descent or operation of law. *Davis v. Davis*, 157.

See EVIDENCE, 5, 17.

WRITS OF ASSISTANCE.

1. **WRIT OF POSSESSION RUNS ONLY AGAINST PARTIES TO SUIT** in which it is issued, or against those who have come into possession under them since the commencement of the suit. *Brush v. Fowler*, 383.
2. **WRIT OF POSSESSION ISSUED IN SUIT TO FORECLOSE MORTGAGE** will not run against a person in possession of the premises before and at the time of the commencement of the suit, who is not made a party thereto. *Id.*
3. **WRIT OF ASSISTANCE ISSUED IN SUIT TO FORECLOSE MORTGAGE** will not justify the officer to whose hands it may come, in putting out of possession of the premises a person who was neither a party to the suit nor named in the writ; but to protect himself in an action of trespass brought by the party who was put out of possession, he will be required to show a decree, as well as the writ. *Id.*
4. **OFFICER TO WHOM WRIT OF ASSISTANCE COMES**, finding person in possession who is not named in the writ, is thereby informed that the judgment was not against such person; and in such case he should return the writ with the fact that such person was in possession of the premises, and that he was therefore unable to execute it. *Id.*
5. **EVEN IF OFFICER WOULD BE PROTECTED IN EXECUTION OF WRIT**, upon person not amenable thereto, the party suing it out and causing it to be improperly executed cannot be justified, nor can he claim any rights or immunities under it, nor can any person through him. *Id.*



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